

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

SUSAN BOYKIN, INDIVIDUALLY)
AND AS PERSONAL)
REPRESENTATIVE OF THE ESTATE)
OF PHILIP BOYKIN,)
PLAINTIFF,)
-VERSUS-) 3:13-CV-00417
SPECTRUM LUBRICANTS CORP,) JULY 29, 2015
ET AL,) COLUMBIA, SC
DEFENDANTS.) VOLUME I OF II
-----)

BEFORE THE HONORABLE SHIVA V. HODGES
UNITED STATES MAGISTRATE JUDGE, PRESIDING
MOTION HEARING

A P P E A R A N C E S:

FOR THE PLAINTIFF: STEVE JENSEN, ESQ.
ALLEN STEWART PC
325 N. SAINT PAUL STREET
SUITE 4000
DALLAS, TX 75201
PRO HAC VICE

FREDERICK J. JEKEL, ESQ.
JEKEL DOOLITTLE
PO BOX 2579
MT. PLEASANT, SC 29465

FOR THE DEFENDANT: LEWIS WALTER TOLLISON, ESQ.
ACUITY TOLLISON LAW FIRM
24 VARDRY STREET, SUITE 203
GREENVILLE, SC 29601

JENNIFER B. BONNEVILLE, ESQ.
STEPTOE AND JOHNSON
633 W. FIFTH STREET, SUITE 700
LOS ANGELES, CA 90071
PRO HAC VICE

1 FOR THE DEFENDANT:
2 SAFETY KLEEN

MICHAEL J. BOGLE, ESQ.
WOMBLE CARLYLE SANDRIDGE
AND RICE
PO BOX 10208
3 GREENVILLE, SC 29603

4 AMANDA M. KOCH, ESQ.
5 JAMES J. MCGOLDRICK, ESQ.
6 WESLEY S. ALOST, ESQ.
7 JONES CARR MCGOLDRICK
8 5910 N. CENTRAL EXPRESSWAY
SUITE 1700
DALLAS, TX 75206
PRO HAC VICE

9 FOR THE DEFENDANT:
10 BEL-RAY

MORRIS DAWES COOK, JR., ESQ.
BARBARA J. WAGNER, ESQ.
BARNWELL WHALEY PATTERSON AND
HELMS
PO DRAWER H
11 CHARLESTON, SC 29402

12 COURT REPORTER:

KATHLEEN RICHARDSON, RMR, CRR
13 UNITED STATES COURT REPORTER
14 901 RICHLAND STREET
COLUMBIA, SC 29201

15 STENOTYPE/COMPUTER-AIDED TRANSCRIPTION

16 *** **

1 THE COURT: GOOD MORNING. HOPE EVERYONE HAD A SAFE
2 FLIGHT IN AND GOOD EVENING LAST NIGHT HERE IN OUR LOVELY
3 CITY. WE ARE ON THE RECORD IN THE CASE OF BOYKIN VERSUS
4 SPECTRUM LUBRICANTS, ET AL. THAT IS CIVIL NUMBER 3:13-417.
5 WE ARE HERE BEFORE THE COURT ON SEVERAL MOTIONS TO STRIKE AND
6 MOTIONS TO EXCLUDE TESTIMONY RENDERED BY THE TWO EXPERTS IN
7 THIS CASE, DRS. HARRISON AND STEWART.

8 I HAVE SPOKEN WITH COUNSEL IN ADVANCE OF THIS HEARING TO
9 DETERMINE THE MOST EFFICIENT WAY FOR US TO PROCEED ON THE
10 PENDING MOTIONS. AND WHAT I'D LIKE TO DO IS TO TAKE UP THE
11 MOTIONS CONCERNING THE TIMELINESS OR UNTIMELINESS OF THE
12 AFFIDAVITS OF DRS. HARRISON AND STEWART, AND THOSE ARE
13 REFLECTED IN THE DOCKET AT MOTION NUMBER 356 AND 374.

14 JUST FOR THE RECORD, I HAVE REVIEWED ALL OF THE PENDING
15 MOTIONS IN THIS CASE AND I'M FAMILIAR WITH THE FACTS AND THE
16 ISSUES, ARGUMENTS THAT HAVE BEEN MADE IN THE MOTION. THE
17 PLAINTIFF HERE IS MRS. SUSAN BOYKIN.

18 MRS. BOYKIN, WELCOME. WELCOME. YOU'RE HERE
19 INDIVIDUALLY AND AS A PERSONAL REPRESENTATIVE OF THE ESTATE
20 OF YOUR LATE HUSBAND, PHILIP BOYKIN. THANK YOU. AND YOU
21 BRING THIS LAWSUIT FOR PERSONAL INJURIES THAT YOU ALLEGE
22 ARISE OUT OF MR. BOYKIN'S EXPOSURE TO BENZENE-CONTAINING
23 SOLVENTS IN PRODUCTS THAT WERE PRODUCED BY THE DEFENDANTS'
24 VARIOUS COMPANIES AND THAT YOU ALLEGE HE USED WHILE HE WAS A
25 MOTORCYCLE MECHANIC IN VARIOUS MOTORCYCLE DEALERSHIPS FOR

1 SOME THIRTY YEARS OR SO, AND YOU ALLEGE, AS I UNDERSTAND,
2 THAT MR. BOYKIN CONTRACTED NON-HODGKIN'S LYMPHOMA THROUGH HIS
3 EXPOSURE TO THE BENZENE IN THE SOLVENTS AND THAT THOSE --
4 THAT NON-HODGKIN'S LYMPHOMA RESULTED IN THE DEVELOPMENT OF
5 PULMONARY EMBOLI OR BLOOD CLOTS THAT EVENTUALLY LED TO HIS
6 DEATH FROM CARDIAC ARREST.

7 SO, THAT'S WHAT I UNDERSTAND THE FACTS TO BE. AS YOU
8 KNOW, WE ARE HERE TODAY TO DETERMINE WHETHER THE EXPERT
9 WITNESSES THAT YOU AND YOUR COUNSEL HAVE HIRED SHOULD BE
10 PERMITTED TO TESTIFY ON THE SCOPE OF THE OPINIONS THAT THEY
11 HAVE RENDERED IN THE REPORTS AS WELL AS AT THEIR DEPOSITION
12 OR WHETHER THE SCOPE OF THEIR TESTIMONY SHOULD BE SOMEWHAT
13 LIMITED UNDER THE LAWS THAT ARE REQUIRED FOR US TO APPLY AND
14 THE VARIOUS CASE LAW AND THE RULES OF CIVIL PROCEDURE AND THE
15 RULES OF EVIDENCE.

16 SO, I HAVE SPOKEN TO THE ATTORNEYS AND I HAVE INDICATED
17 TO THEM THAT I HOPE TO GO UNTIL ABOUT LUNCH TIME BEFORE WE
18 TAKE A BREAK AND THEN WE WILL RESUME THIS AFTERNOON AND
19 PROBABLY TAKE A BREAK IN THE MID-AFTERNOON. BUT IF YOU OR
20 ANYONE HERE IN THE COURTROOM WOULD LIKE TO TAKE A BREAK, A
21 COMFORT BREAK, THEN CERTAINLY LET US KNOW AND WE'LL
22 ACCOMMODATE YOU. BUT WELCOME TO COLUMBIA, SOUTH CAROLINA AND
23 THE DISTRICT OF SOUTH CAROLINA.

24 SO, I SUPPOSE FOR THE RECORD THE REMAINING DEFENDANTS IN
25 THIS CASE -- THIS CASE STARTED OUT WITH MANY DEFENDANTS. BUT

1 THE REMAINING DEFENDANTS THAT I SEE ON THE DOCKET ARE ACUITY
2 SPECIALTY PRODUCTS, INC, WHICH I'LL REFER TO AS ACUITY, AND
3 SAFETY KLEEN SYSTEMS, INC, AND I'LL REFER TO IT AS SAFETY
4 KLEEN, AND THEN BEL-RAY COMPANY, INC, WHICH I WILL REFER TO
5 AS BEL-RAY.

6 THERE ARE -- THE MOTIONS ARE VARIOUSLY STYLED. SOME ARE
7 MOTIONS TO STRIKE AND OTHERS ARE MOTIONS TO EXCLUDE.
8 TYPICALLY MOTIONS TO STRIKE ARE GOVERNED BY FEDERAL CIVIL
9 PROCEDURE 12(F) WHICH ALLOWS THE COURT TO STRIKE FROM A
10 PLEADING AN INSUFFICIENT DEFENSE OR ANY REDUNDANT,
11 IMMATERIAL, IMPERTINENT OR SCANDALOUS MATTER. SO I THINK
12 TECHNICALLY, ALTHOUGH THEY ARE STYLED AS MOTIONS TO STRIKE,
13 REALLY WHAT WAS INTENDED AND HOW I WILL INTERPRET THOSE
14 MOTIONS IS TO CHALLENGE THE AFFIDAVITS ON THE ADMISSIBILITY
15 OF THE EVIDENCE CONTAINED THEREIN.

16 AND SO -- SO, WITH THAT, I'M HAPPY TO HEAR THE ARGUMENTS
17 ON THE UNTIMELINESS WHICH ARE REFLECTED IN DOCUMENTS NUMBER
18 356 AND 374. I BELIEVE THERE IS ONE SET OF ARGUMENTS
19 CONCERNING THE SPECIFIC CAUSATION AND ANOTHER ON GENERAL
20 CAUSATION, AND DIFFERENT DEFENDANTS ARE GOING TO BE ARGUING
21 THOSE AS TO THE SUBSTANCE OF THE -- OF THE OPINION.

22 THE UNTIMELINESS MOTIONS WERE FILED BY ACUITY AND SAFETY
23 KLEEN, I BELIEVE, AND SO WHICH -- WHICH DEFENDANT WOULD
24 PREFER TO GO FIRST ON THE UNTIMELINESS MOTION? SAFETY KLEEN?
25 ACUITY? OKAY.

1 SO, IF YOU WOULD, AS YOU SPEAK, PLEASE INDICATE YOUR
2 APPEARANCE ON THE RECORD SO THAT THE COURT REPORTER CAN BE
3 SURE TO GET YOUR NAME, YOUR NAME CORRECT. THANK YOU, SIR.

4 MR. TOLLISON: THANK YOU, YOUR HONOR. WALT
5 TOLLISON WITH THE TOLLISON LAW FIRM, AND I'M HERE WITH
6 JENNIFER BONNEVILLE WITH STEPTOE AND JOHNSON OUT OF
7 CALIFORNIA, AND WE BOTH REPRESENT ACUITY AS IT RELATES TO ALL
8 OF THE MOTIONS WHERE ACUITY IS A MOVING PARTY.

9 AT THIS POINT I'M GOING TO TAKE UP THE MOTION TO STRIKE
10 AS FILED BY ACUITY REGARDING THE -- NOT NECESSARILY THE
11 ENTIRE AFFIDAVIT. SAFETY KLEEN WILL ADDRESS MORE IN THEIR
12 MOTION FOR PURPOSES OF EFFICIENCY. I THINK THEIR MOTION WENT
13 MORE TO THE TOTALITY OF THE AFFIDAVIT.

14 THE COURT: RIGHT.

15 MR. TOLLISON: MY MOTION WENT TO SOME EXACTNESS
16 WITHIN THE AFFIDAVITS THAT WE WOULD LIKE STRICKEN OR HOWEVER
17 THE COURT MAY WANT TO TERM IT. I APPRECIATE THE COURT HAVING
18 TO GO THROUGH WHAT WE SHOULD HAVE CALLED IT BECAUSE WE
19 ACTUALLY WENT THROUGH THE SAME PROCESS AS TO WHAT--

20 THE COURT: WELL, I MIGHT BE WRONG. YOU MIGHT
21 STILL BE RIGHT.

22 MR. TOLLISON: WELL, I DON'T HOLD ANY WISDOM IN
23 THAT REGARD. LET ME, THOUGH, FOR THE RECORD, YOUR HONOR,
24 FIRST AND FOREMOST, I JUST WANT TO PERSONALLY AS LOCAL
25 COUNSEL THANK THE COURT AND THANK PARTICULARLY YOUR STAFF AND

1 AS WELL AS JUDGE LEWIS' STAFF FOR BEING AS ACCOMMODATING AND
2 WORKING WITH THE PARTIES WITH RESPECT TO COORDINATION AND
3 WITH RESPECT TO THE INTRUSION, IF YOU WILL, BY ALL THE
4 DOCUMENTS AND THE ELECTRONIC USE AND ALL THAT IN A RELATIVELY
5 SHORT PERIOD OF TIME. SO WE THANK YOU AND YOUR STAFF.
6 YOU'RE ONLY AS -- WE ALWAYS KNOW WE ARE ONLY AS TALENTED AS
7 THE TALENT AROUND US, AND I THINK YOU HAVE BEEN BLESSED IN
8 THAT REGARD. SO...

9 THE COURT: WELL, THANK YOU. I AGREE. I
10 APPRECIATE THE KIND WORDS.

11 MR. TOLLISON: AND TO ALL OF THEM AS WELL. YOUR
12 HONOR, I GUESS WHAT I WANTED TO DO WAS TO ESSENTIALLY KIND OF
13 CAPTURE AS IT RELATES TO THIS KIND OF WHERE WE ARE. I THINK
14 THE COURT PROBABLY SAYS I HAVE READ THE BRIEFS, I UNDERSTAND
15 WHERE WE ARE. BUT I WANTED TO KIND OF ADD TO, IF I COULD,
16 JUST KIND OF HOW WE GOT HERE, AND THEN MAYBE ON THE BACK END
17 WITH A LITTLE BIT MORE OF WHAT I FEEL LIKE SHOULD HAPPEN WITH
18 GREAT DEGREE OF RESPECT AND HOW WE SHOULD PROCEED FORWARD
19 DEPENDING UPON WHATEVER FORK IN THE ROAD THE COURT, YOU KNOW,
20 MAY CHOOSE IN THAT REGARD.

21 AND WE ARE HERE BECAUSE FOR THE FIRST TIME IN MY
22 RESPECTFUL OPINION AND THIS ENTIRE CASE, THROUGH NUMEROUS
23 AMENDED SCHEDULING ORDERS AND THROUGH NUMEROUS MONTHS OF
24 DISCOVERY, FACT DISCOVERY AND EXPERT DISCOVERY AND KIND OF
25 THE CLOSE OF THE CASE, IF YOU WILL, YOU KNOW, THE -- IF

1 DISCOVERY AND PRETRIAL IS A BOXING MATCH, IT ENDED. AND POST
2 THE BOXING MATCH, YOU KNOW, WE GOT HIT WITH A LEFT JAB BY
3 PLAINTIFFS WITH RESPECT TO ACUITY FOR THE FIRST TIME BEING
4 ADDED INTO THE MIX OF PRODUCTS WITH RESPECT TO A PARTS
5 WASHING FLUID.

6 AND IF YOUR HONOR HAS READ ENOUGH, IT MIGHT SAY I
7 UNDERSTAND THE PARTS WASHER. I MIGHT EVEN HAVE GOOGLED WHAT
8 IT WAS, BUT IT'S -- ESSENTIALLY IT'S A MACHINE OR AN
9 APPARATUS THAT HAS A SINK BASIN. IT'S NOT THAT
10 SOPHISTICATED. UNDERNEATH IT SITS A DRUM THAT WOULD HAVE
11 CLEAN, DEGREASING OR CLEAN MATERIAL IN IT, MINERAL SPIRITS OR
12 SOME TYPE OF THING WHERE YOU WOULD ESSENTIALLY PUMP THIS
13 FLUID INTO A SINK BASIN, CLEAN THE PARTS AS KIND OF A
14 DEGREASING TYPE OF OPERATION.

15 AND SO, COLUMBIA YAMAHA SPORTS, WHERE MR. BOYKIN WORKED,
16 HAD A PARTS WASHER AND -- BUT FOR THE FIRST TIME WE HAVE KIND
17 OF BEEN HIT WITH AN ALLEGED OR GENERAL VAGUE PARTS WASHING
18 FLUID LINKED TO ACUITY FOR THE YEARS 2008 2009, AND THAT'S
19 THE FIRST TIME WE HAVE SEEN THAT, FIRST TIME WE HAVE HEARD
20 THAT, FIRST TIME WE HAVE BEEN TOLD AT THE BACK END OF THE DAY
21 AFTER THE MATCH IS OVER, OH BY THE WAY, YOU KNOW, WE ARE
22 GOING TO NOW INTRODUCE A NEW PARTS WASHING FLUID INTO THIS.

23 BUT IT CAME US TO, YOUR HONOR, AND I THINK IT'S
24 IMPORTANT KIND OF IN A DIFFERENT FIELD OF PLAY. I MEAN,
25 TYPICALLY IF THE EXPERT WANTED TO AMEND HIS OR HER RESPECTIVE

1 REPORT AND THEY WANTED TO DO SO BASED UPON AN INACCURACY OR
2 BASED UPON A LACK OF COMPLETENESS, YOU WOULD SERVE US WITH A
3 RULE 26(E) RESPONSE, A PLEADING. PURSUANT TO RULE 26(E), WE
4 ARE AMENDING, WE ARE SUPPLEMENTING, BUT THAT DIDN'T HAPPEN.

5 SO, SO IT DIDN'T COME TO US BY VIRTUE OF RULE 26(E) EVEN
6 THOUGH THAT THE PLAINTIFFS WANT TO ARGUE THIS IS A
7 SUPPLEMENTATION ISSUE AND IT'S PROPER AND TIMELY, BUT THEY
8 NEVER DID THAT. SO WHAT HAPPENED TO US WAS, AS YOU KNOW, WAS
9 EMBEDDED IN THESE AFFIDAVITS, THESE NEW AFFIDAVITS. WHAT
10 HAPPENED WAS WE MOVED TO EXCLUDE. PLAINTIFFS FILED A
11 RESPONSE BRIEF. THEY ATTACHED TO THIS THESE TWO NEW
12 AFFIDAVITS THAT FOR THE FIRST TIME KIND OF EMBEDDED IN THERE
13 WAS SOME REFERENCE TO ACUITY.

14 AND IT DOESN'T SPEAK TO HOW IT GOT THERE, WHY IT GOT
15 THERE, WHAT WAS DIFFERENT, WHAT WAS THE RECALCULATION OF
16 THE -- OF THE EVIDENCE BEFORE IT. IT JUST -- IT JUST
17 APPEARED. AND FOR STEWART IT APPEARED IN A DANGLING
18 FOOTNOTE. BY THE WAY, ACUITY'S PARTS WASHING FLUID 08 09.
19 AND THEN HARRISON IN HIS AFFIDAVIT, AS YOU CAN SEE IN THE
20 RECORD, IS KIND OF, BY THE WAY, THROUGH HYPHENS, ACUITY NOW
21 HAS A PARTS WASHER FLUID AND ONLY REALLY A PARTS WASHER FLUID
22 THAT'S NOW IN THE CASE.

23 AND SO -- SO WE FELT IT WAS APPROPRIATE TO MOVE TO
24 STRIKE ANY REFERENCE TO THE ACUITY PARTS WASHER FLUID IN THE
25 AFFIDAVIT AND THAT SAFETY KLEEN WILL SPEAK TO THE

1 APPROPRIATENESS OR LACK THEREOF I GUESS FROM THE PLAINTIFFS'
2 OPPOSITION TO THE TOTALITY OF THE AFFIDAVITS AS A WHOLE, TO
3 WHICH I AGREE WITH, BUT WE JUST SIMPLY MOVED -- WE HAVE GOT
4 TO TAKE THIS NEW PRODUCT, THIS NEW DAY, THIS NEW EXPOSURE TO
5 ACUITY OUT OF THE PICTURE.

6 THE COURT: MR. TOLLISON, WHAT -- THE CLAIMS THAT
7 YOU WERE AWARE OF AGAINST ACUITY, WHAT TYPES OF PRODUCTS--

8 MR. TOLLISON: AEROSOL SPRAY LIKE A -- LIKE BRAKE
9 CLEANER, CARBURETOR CLEANER.

10 THE COURT: SO THOSE WERE ALL AEROSOL SPRAYS, AND
11 SO THIS IS -- THIS COMES IN A DIFFERENT FORM AND WASN'T
12 RELATED TO ANY OF THOSE.

13 MR. TOLLISON: RIGHT. AND IT MIGHT HAVE BEEN --
14 MAY HAVE MADE SOME REFERENCE TO A LIQUID, BUT IT WASN'T A
15 PARTS WASHER FLUID. AND WHAT I WANTED TO DO, IF I COULD, WAS
16 KIND OF TAKE YOU REAL QUICKLY HOW WE GOT HERE BECAUSE THIS
17 PARTS WASHER PART OF THE CASE HAS HAD ALMOST A LIFE OF ITS
18 OWN, AND IT'S A DIFFERENT ENTITY. I MEAN, IT'S A MATERIAL
19 THAT COMES IN A DRUM. SO IT DOESN'T COME OFF A SHELF LIKE IN
20 AN AEROSOL CAN OR A LITTLE SMALL CONTAINER THAT MIGHT HAVE A
21 LITTLE LIQUID IN IT THAT YOU WOULD USE AS PART OF BEING A
22 MECHANIC.

23 SO HERETOFORE, WE HAVE BEEN IN IT FOR THAT TYPE OF
24 PRODUCT. WE HAD NOT BEEN IN THE CASE AT ALL FOR A PARTS
25 WASHING FLUID. AND IMPORTANT TO NOTE, THE EXPERTS WHEN

1 ASKED -- WHEN THESE TWO AFFIDAVITS CAME IN WITH JUST THIS
2 REFERENCE, A SINGLE SOLITARY REFERENCE, WHEN YOU READ ALL OF
3 THE REST OF STEWART'S AFFIDAVIT, HE DOESN'T EVEN TALK ABOUT
4 US ANY MORE. HE GOES THROUGH I THINK PARAGRAPHS -- I THINK
5 IN STEWART PARAGRAPHS 45 THROUGH 63 DEALT WITH -- AND AS YOU
6 KNOW, THE AFFIDAVITS WERE TO REBUT OUR ARGUMENT, WHY HIS
7 METHODOLOGY IS CORRECT, WHY HE SHOULD NOT BE EXCLUDED, WHY
8 HIS OPINION SHOULDN'T BE INCLUDED. BUT FOR 45 THROUGH 63 IS
9 ALL ABOUT SAFETY KLEEN.

10 THERE'S NO REFERENCE IN THAT AFFIDAVIT AT ALL TO ACUITY.
11 SO, HERE'S THE -- WE DIDN'T MAKE A PART -- THE PRODUCT IS A
12 ZEP PRODUCT. SO YOU THINK AN EXPERT'S GOING TO AMEND HIS
13 REPORT IN THE SENSE OF WHICH HE SHOULD AND THE SENSE OF WHICH
14 WOULD BE APPROPRIATE, HE WOULD REFER TO THE -- A ZEP PRODUCT
15 X OR A ZEP PRODUCT Y. ACUITY DIDN'T HAVE A PARTS WASHER
16 FLUID. AND IT OWNED COMPANIES THAT THROUGH BRANDED NAMES HAD
17 PARTS WASHER FLUID, BUT IT WOULD HAVE BEEN A ZEP PARTS
18 WASHER. THEY DON'T EVEN REFER TO THE ZEP PARTS WASHER FLUID
19 IN THE EXPERT AFFIDAVIT. THEY JUST REFER TO ACUITY'S PARTS
20 WASHER FLUID.

21 SO IF I COULD REAL QUICK, I WANT TO KIND OF TAKE YOU
22 THROUGH A TIMELINE ON THIS THING, AND I WILL TRY TO MAKE --
23 BE AS BRIEF AND SUCCINCT AS I CAN. THIS ORIGINAL CASE
24 STARTED IN STATE COURT. AND IT STARTED THERE BECAUSE THEY
25 NAMED A DEFENDANT THAT WAS A -- A SOUTH CAROLINA RESIDENT

1 NAMED PROVIDENCE ENVIRONMENTAL. AND IT WAS THE LONE STATE
2 DEFENDANT AND DOMICILE DEFENDANT, AND AS A RESULT OF THAT
3 THERE WAS NO DIVERSITY.

4 SO, AS THE CASE PROCEEDED, WE ALL BEGAN TO WONDER
5 WHAT -- WHAT WE -- PROVIDENCE HASN'T MADE AN APPEARANCE,
6 THERE HASN'T BEEN ANYTHING ON DEFAULT, WE DIDN'T KNOW WHAT
7 WAS GOING ON WITH PROVIDENCE, AND SO WE DELVED INTO WHO
8 PROVIDENCE WAS AND WHAT THEY DID. AND FROM SOME AFFIDAVITS
9 THAT WE PROCURED, WE REMOVED THE CASE TO FEDERAL COURT ON THE
10 BASIS THAT PROVIDENCE ENVIRONMENTAL DID NOT SUPPLY A CHEMICAL
11 OR HAVE A CHEMICAL PER SE THAT WAS AT ISSUE IN THIS
12 PARTICULAR CASE; THAT ALL THEY DID WAS SERVICE THE PARTS
13 WASHER BY REMOVING WASTE OR REMOVING TIRES OR OLD RAGS BUT
14 NOT NECESSARILY BEING A SUPPLIER OF A SOLVENT OR A CHEMICAL.

15 AND SO THAT WAS UNCHALLENGED BY THE PLAINTIFF, AND SO
16 THE CASE WAS REMOVED, AND THEN THE PLAINTIFF DISMISSED
17 PROVIDENCE ENVIRONMENTAL FROM THE CASE. AND SO WE THEN WERE
18 IN FEDERAL COURT. WE STARTED OFF WITH JUDGE ANDERSON, THEN
19 WE ENDED UP HAVING JUDGE SEYMOUR, AND NOW JUDGE LEWIS, AND --
20 BUT DURING THE 2013 TIMEFRAME, YOUR HONOR, WE BEGAN TO DO
21 DISCOVERY.

22 SO WE STARTED TAKING CO-WORKER DEPOSITIONS. AND WE TOOK
23 MRS. BUSSEY -- I MEAN MRS. BOYKIN'S DEPOSITION. BUT WE TOOK
24 ALL OF THE CO-WORKERS -- IT'S AS MANY AS EVERYBODY NOTICED.
25 AND BY THE FALL OF 2013 WE HAD PRETTY MUCH COMPLETED THE

1 FACTUAL RECORD. WE STILL HAD ONE PERSON TO DEPOSE AND HIS
2 NAME WAS CAJUN CAVALIER. I WANT TO SPEAK TO WHY HE ENDED
3 UP -- WHY HE HAD NOT BEEN BUT ULTIMATELY WAS.

4 IN NOVEMBER OF 2013 AS A RESULT OF ALL OF THESE
5 DEPOSITIONS, THE PLAINTIFFS MOVED TO AMEND THE COMPLAINT TO
6 ADD PROVIDENCE BACK IN AGAIN. THE PLAINTIFFS' POSITION WAS
7 THAT IN LIGHT OF ALL OF THE TESTIMONY THAT HAD TRANSPIRED IN
8 THE DEPOSITIONS, PROVIDENCE DID IN FACT SUPPLY CHEMICAL AND
9 DID IN FACT SUPPLY SOLVENT THAT WENT INTO THE PARTS WASHER
10 BASIN, AND THEY SHOULD THEREFORE BE NOW A DEFENDANT.

11 SO, YOU KNOW, WE HAD TO THEN GO THROUGH -- THEN WE HAD
12 TO THEN GO THROUGH, YOU KNOW, ESSENTIALLY THE TESTS THAT THE
13 COURT WOULD UTILIZE AS TO WHETHER IT WAS -- SHOULD BE A
14 PROPER JOINDER OR AN IMPROPER JOINDER. SO THE BRIEFING ALL
15 TOOK PLACE IN 2013, ROUGHLY DECEMBER, NOVEMBER AND DECEMBER,
16 AND THE HEARING WAS IN FEBRUARY OF '14, AND THEN JUDGE
17 SEYMOUR DENIED THEIR MOTION I THINK IN MARCH OF 2014.

18 NOW, THIS IS WHY THAT'S IMPORTANT. BY THE TIME THIS HAD
19 ALL HAPPENED, OUR FACTUAL RECORD FOR THE MOST PART WAS
20 COMPLETE. NOTHING HAS CHANGED SINCE THEN. THERE HAS BEEN NO
21 MORE WRITTEN DISCOVERY. THERE'S BEEN NO MORE DOCUMENT
22 PRODUCTIONS. THERE HAS BEEN NO MORE DEPOSITIONS OF LAY
23 PEOPLE. WE THEN JUST PROCEEDED TO TAKE THE EXPERTS ALL KIND
24 OF THROUGH 2014.

25 AND AT THIS POINT IT APPEARED TO BE -- THE RECORD WAS --

1 FOR THE MOST PART WAS THAT FROM LET'S JUST SAY DAY ONE UNTIL
2 2003 OR 2004 SAFETY KLEEN WAS THE SUPPLIER OF THE PRODUCT
3 THAT WAS USED IN THE PARTS WASHER MACHINE. THEN FROM 2003 OR
4 2004 -- THERE'S NO EXACTNESS, THERE WAS A LITTLE BIT OF
5 TESTIMONY ON BOTH SIDES OF THAT, THE DOCUMENTS I THINK MAY
6 TAKE IT TO A DIFFERENT POINT. I'LL LET SAFETY KLEEN SPEAK TO
7 WHERE THEY ARE MORE COMFORTABLE WITH THE EXACTNESS OF THEIR
8 PERIOD OF TIME AT COLUMBIA YAMAHA -- BUT '03 TO '04
9 PROVIDENCE WAS THERE AND PROVIDENCE STAYED THERE UNTIL
10 ROUGHLY 2007, 2008.

11 THEN THE RECORD FROM MY UNDERSTANDING WAS FAIRLY -- THE
12 BEST CLARITY OF THE RECORD WAS FROM 2008 FORWARD THAT
13 DIVERSIFIED, WHICH IS A COMPANY OUT OF ROCK HILL -- I'M STILL
14 NOT SURE WHY THE PLAINTIFFS NEVER SUED THEM, BUT THAT'S NOT
15 FOR ME TO DISCERN -- BUT THEY WERE THE SUPPLIER OF THE PARTS
16 WASHER FLUID IN 2007, 2008 KIND OF GOING FORWARD UNTIL
17 MR. BOYKIN'S DEATH, SO THROUGH 2009.

18 NOW, WHY IS THAT IMPORTANT? WELL, WHEN STEWART AND
19 HARRISON DID THEIR RULE 26 REPORTS IN DECEMBER OF 2013 AS IT
20 RELATES TO THE PARTS WASHER FLUID FROM 2003 FORWARD, IT WAS
21 PRETTY CLEAR THAT BOTH OF THEM SAID THE FOLLOWING. DR.
22 STEWART IN HIS -- IN HIS DECEMBER 13 -- I MEAN STEWART SAID
23 IN HIS REPORT THAT THEY COULD NOT -- IF I CAN READ IT TO YOUR
24 HONOR SPECIFICALLY -- THEY SAID -- STEWART SAID ON PAGE 10 OF
25 HIS ORIGINAL REPORT, HE SAID THE FOLLOWING: BASED ON THE

1 TESTIMONY AVAILABLE, I DETERMINED TO A REASONABLE DEGREE -- I
2 MEAN A REASONABLE SCIENTIFIC PROBABILITY FOR PURPOSES OF THIS
3 EXPOSURE ASSESSMENT THAT IN THE PERIOD FROM LATE 1987 WHEN
4 MR. BOYKIN STARTED TO 2003 SAFETY KLEEN SUPPLIED THE SOLVENT.
5 DURING THE PERIOD FROM 2003 TO 2009, ALTHOUGH THE PARTS
6 WASHER WAS STILL IN USE, THE SUPPLIER OF THE SOLVENT CANNOT
7 BE CONCLUSIVELY IDENTIFIED FROM THE INFORMATION AVAILABLE AT
8 THE TIME OF THIS REPORT.

9 NOW, DR. STEWART HAD ALL OF THE DEPOSITIONS. AND DR.
10 STEWART HAD -- AS WELL AS THAT, HE HAD MRS. BUSSEY'S JULY --
11 I MEAN MRS. BUSSEY'S JULY DEPOSITION AND HE ALSO HAD
12 MRS. BUSSEY'S AUGUST DEPOSITION AS WELL AS EVERYBODY ELSE.
13 DR. STEWART'S TESTIMONY, YOUR HONOR, IS ACCURATE. YOU CANNOT
14 DISCERN OR ESTABLISH WITH ANY DEGREE OF SCIENTIFIC CERTAINTY,
15 WITH ANY DEGREE OF FOUNDATION AS TO WHO WAS REALLY THERE FROM
16 2003 TO 2009 SUPPLYING THE SOLVENT.

17 DR. HARRISON IN HIS REPORT ON PAGE EIGHT OF HIS ORIGINAL
18 REPORT HE SAYS -- HE SAYS, FROM 1998 TO 2003 THE PARTS WASHER
19 WAS SUPPLIED BY SAFETY KLEEN. ALTHOUGH THE PARTS WASHER WAS
20 STILL IN USE FROM 2003 TO 2009, THE SUPPLIER OF THE SOLVENT
21 COULD NOT BE CONCLUSIVELY DEMONSTRATED.

22 NOW, AT THE DEPOSITIONS OF DR. STEWART HE DIDN'T CHANGE
23 ANYTHING HE HAD PUT IN THAT REPORT ABOUT THAT PARTICULAR
24 REFERENCE. DR. HARRISON IN HIS DEPOSITION, YOUR HONOR, ON
25 PAGE 216 OF HIS FEBRUARY 7 -- I MEAN IN HIS JUNE 30TH, 2014

1 DEPOSITION SAID THE FOLLOWING. AND THE QUESTION. THE
2 QUESTION: AND YOU ALSO NOTE THAT THE SUPPLIER OF THE PARTS
3 WASHER SOLVENT FROM '03 TO '09 WITHIN QUOTE COULD NOT BE
4 CONCLUSIVELY DEMONSTRATED, CLOSED QUOTE, CORRECT. QUESTION
5 MARK. AND THE ANSWER IS CORRECT.

6 AND THEN THE QUESTION. IS IT STILL YOUR UNDERSTANDING
7 THAT THIS SUPPLIER CANNOT BE CONCLUSIVELY DEMONSTRATED? AND
8 THE ANSWER IS: THAT'S MY UNDERSTANDING. AT LEAST THERE
9 HASN'T BEEN ANYTHING GIVEN TO ME. I WAS SUMMARIZING WHAT DR.
10 STEWART HAD DERIVED AND WRITTEN IN HIS REPORT. HAVE NOT SEEN
11 ANY OTHER INFORMATION ABOUT THE SUPPLIER OF THAT SOLVENT.

12 SO, AT THAT POINT THE RECORD WAS COMPLETE, THE RECORD
13 WAS FIXED, THERE HAVE BEEN NO NEW DEPOSITIONS, NO NEW
14 DOCUMENTS, NO NEW DISCOVERY, AND ALL OF A SUDDEN IN FEBRUARY
15 WE GET A REFERENCE TO A PARTS -- BUT HERE'S THE PROBLEM.
16 NOWHERE DO THEY -- THEY DON'T SERVE IT UNDER RULE 26(E), SO
17 THEY LOSE THE TIMELINESS -- IT STILL HASN'T HAPPENED UNDER
18 RULE 26(E). IT JUST WAS OFFERED AS PART OF AN AFFIDAVIT TO
19 REBUT THE MOTIONS TO EXCLUDE.

20 BUT THERE WAS NOTHING INACCURATE IN STEWART'S REPORT.
21 THERE WAS NOTHING INCOMPLETE OR -- AND HARRISON'S. THERE WAS
22 NOTHING INCOMPLETE IN STEWART OR HARRISON'S REPORT OR
23 INACCURATE. BUT THEY DON'T MAKE A REFERENCE AS TO WHAT THEY
24 ARE CLARIFYING IF THEY WERE OR WHAT THEY ARE AMENDING THAT
25 WAS HERETOFORE WRONG OR WHAT WAS INCOMPLETE OR INACCURATE

1 ABOUT THE FIRST REPORT. IT JUST COMES IN THERE OUT OF
2 NOWHERE.

3 NOW THE PLAINTIFFS TAKE THE POSITION -- AND OF COURSE,
4 THEN THE -- THEN YOU HAVE TO MOVE TO, AS YOU KNOW, THE
5 SUBSTANTIAL JUSTIFICATION AND THE HARMLESS ARGUMENT, AND I
6 WANT TO TOUCH ON THAT. THE SURPRISE PIECE OF THE FIVE
7 ELEMENTS THAT SOUTHERN STATES LAYS OUT FOR US, THE SURPRISE
8 ELEMENT TO ME I -- I THINK IS SO TELLING; THAT BECAUSE THE
9 PLAINTIFF WANTS TO ARGUE IN THE BRIEF THAT YOU HAVE THAT IT
10 WAS THE JULY, 2013 DEPOSITION OF MRS. BUSSEY THAT GIVES
11 CREDENCE TO THIS ARGUMENT WE WERE ON NOTICE, IT WAS QUITE
12 CLEAR THAT THE ACUITY'S -- I DON'T KNOW WHERE THEY GET THE
13 ACUITY FROM, BUT LET'S JUST GIVE THEM SOME CREDIT THERE --
14 THAT THE ACUITY SLASH ZEP PARTS WASHER FLUID WAS IN USE IN
15 2008, 2009 AND THAT GIVES THE SUBSTANTIAL JUSTIFICATION FOR
16 US BEING ON NOTICE THAT WE SHOULDN'T CRY FOUL NOW.

17 BUT THE PROBLEM WITH THE -- THE BRIEF IS IT MAKES NO
18 REFERENCE TO THE AUGUST DEPOSITION THAT WAS THE CONTINUATION
19 OF MRS. BUSSEY'S DEPOSITION AND THE FINAL PIECE TO
20 MRS. BUSSEY'S DEPOSITION. AND IF I COULD, I JUST WANT THE
21 COURT -- IN MRS. BUSSEY'S SECOND DEPOSITION MR. FRIELING, WHO
22 IS PLAINTIFFS' COUNSEL, AT THE VERY END OF THE DEPOSITION --
23 SO STARTING ON PAGE 269, YOUR HONOR, AND RUNNING THROUGH PAGE
24 277 HE GOES THROUGH AND TRIES TO OBTAIN FROM MRS. BUSSEY SOME
25 CLARITY ON THE -- ON THE WHO SUPPLIED THE PARTS WASHER

1 SOLVENT AFTER 2003.

2 AND IF YOU GO TO PAGE 276, HE SAYS AT THE BOTTOM OF --
3 ON LINE 19, I SEE, OKAY. THIS IS MR. FRIELING TALKING. SO
4 THE ZEP MATERIAL, DO YOU KNOW IF THE ZEP MATERIAL WAS USED IN
5 THE PARTS WASHER? AND MRS. BUSSEY SAID, NOT FOR SURE. THE
6 NEXT QUESTION. ALL RIGHT. DO YOU KNOW WHO CAN ANSWER THAT
7 QUESTION? SHE SAID, I THINK -- I WOULD THINK JAMES. THAT'S
8 THE GUY NAMED -- HER HUSBAND JAMES BUSSEY WHO GOES BY BUCK
9 WHO IS A -- EXCUSE ME -- WHO WAS A CO-WORKER OF MRS. BOYKIN,
10 MR. BOYKIN FOR ALL THE YEARS.

11 NOW, JUST LET ME STOP A MINUTE. BUCK WAS DEPOSED TWICE.
12 HE DIDN'T KNOW WHO SUPPLIED THE PARTS WASHER. NOTHING CAME
13 OUT OF HIS DEPOSITION. SO THE NEXT QUESTION MR. FRIELING
14 ASKED WAS, OKAY, WE'LL ASK HIM OR I'LL ASK HIM. OKAY.
15 ANYBODY ELSE WHO IS AROUND THAT -- DURING THAT PERIOD OF
16 TIME? AND SHE SAYS, I BELIEVE NATE WAS THERE. THAT WAS NATE
17 CULLER.

18 WE TOOK HIS DEPOSITION. THERE'S NO REFERENCE TO -- BY
19 THE PLAINTIFFS TO NATE CULLER'S DEPOSITION. THEN HE FINALLY
20 SAYS, OKAY, TERRIFIC. SO I GUESS THE BOTTOM LINE IS AFTER
21 2003 WE STILL REALLY DON'T KNOW WHO OR WE DON'T KNOW WHO
22 MANUFACTURED THE SOLVENT THAT WAS USED IN THE PARTS WASHER.
23 AND MRS. BUSSEY SAYS, NO. NEXT QUESTION, WE DON'T KNOW THE
24 ANSWER TO THAT QUESTION. AND THE ANSWER IS, I DO NOT.

25 NOW, THAT'S WHY STEWART'S ORIGINAL REPORT WAS ACCURATE.

1 THAT'S WHY HARRISON'S ORIGINAL REPORT WAS ACCURATE. WHEN YOU
2 READ ALL OF THE DEPOSITIONS, THE RECORD WAS CLEAR. WE JUST
3 DON'T KNOW. SO -- SO HERE IS ONE THING I WANT TO SHOW YOUR
4 HONOR AS WELL, IS THAT IN 2013, IN JULY -- I WOULD LIKE TO
5 HAND THESE UP FOR YOUR HONOR JUST SO YOU CAN SEE THE -- SO
6 MRS. BUSSEY WAS DEPOSED IN JULY AND IN AUGUST. BUT THE END
7 OF JULY -- IF I COULD APPROACH, YOUR HONOR.

8 THE COURT: PLEASE. YOU DON'T NEED TO ASK
9 PERMISSION TO APPROACH. WHENEVER YOU WANT TO, PLEASE FEEL
10 FREE.

11 MR. TOLLISON: WHAT I WANTED TO -- AND I HAVE
12 GOT -- IT'S PLAINTIFFS' -- WHAT HAPPENED WAS IN JULY, AT THE
13 END OF JULY THEY SERVED US, THE PLAINTIFFS SERVED US, WITH
14 DISCOVERY, WRITTEN DISCOVERY. AND THEY SERVED US WITH A SET
15 OF REQUEST TO PRODUCE AND THEY SERVED US WITH AN
16 INTERROGATORY, SO LET ME SHOW YOU THE BOTH OF THESE AND THAT
17 WAY YOU WILL BE COMPLETE.

18 THEY SERVED US WITH A SET OF SUPPLEMENTAL
19 INTERROGATORIES AND A SET OF REQUESTS TO PRODUCE. NOW, WHY
20 IS THIS IMPORTANT? IF THE PLAINTIFF WANTS TO MAINTAIN THE
21 POSITION NOW, YOUR HONOR, THAT THE JULY 2013 DEPOSITION OF
22 MRS. BUSSEY WAS SO CLEAR AND SO EXACT WITH RESPECT TO ACUITY
23 BEING THE PARTS WASHER SUPPLIER FOR 2008 AND 2009, THEY
24 DIDN'T ASK US A SINGLE QUESTION ABOUT THE PARTS WASHER FLUID.

25 SO IF YOU -- IF YOU NOTICED ON THE REQUEST TO PRODUCE

1 AND THE INTERROGATORIES, THEY ASKED US ABOUT CHOKING
2 CARBURETOR CLEANER, THEY ASKED US ABOUT CLEAN BRAKE, WHICH
3 WAS AN AEROSOL, AND THEY ASKED US ABOUT RAPID SOL, WHICH IS
4 AN AEROSOL.

5 NOW, IF THE JULY DEPOSITION WAS SO CLEAR AS THEY WANT
6 YOU TO MAKE IT SEEM TODAY THAT WE WERE ON NOTICE THAT THE
7 ACUITY PARTS WASHER FLUID WAS IN THE GAME AND WAS ON THE
8 TABLE AND WE WERE EXPOSED TO IT, THEY DIDN'T ASK US A SINGLE
9 QUESTION FROM THAT JULY. WHY? BECAUSE IT WASN'T CLEAR FROM
10 THE JULY DEPOSITION THAT WE WERE IN THE GAME. AND IT BECAME
11 ABSOLUTELY ESTABLISHED AFTER THE AUGUST DEPOSITION THAT WE
12 WEREN'T IN THE GAME.

13 NOW LET ME MAKE ONE OTHER -- I WANT TO INTRODUCE ONE
14 OTHER EXHIBIT FOR YOUR HONOR AND THEN THAT WILL BE THE LAST
15 THING I THINK I WILL HAND UP. BACK IN -- SO I WANT TO GO
16 FORWARD THEN AGAIN, AND THIS IS I THINK AGAIN SPEAKS TO THE
17 FACT THAT THE PLAINTIFFS HAVE PULLED THIS OUT OF THIN AIR.

18 IN NOVEMBER OF 2013 WHEN I WAS SPEAKING EARLIER AS TO
19 THE HISTORY OF THE PLEADINGS, WHEN THEY SOUGHT TO AMEND TO
20 ADD PROVIDENCE BACK IN THE CASE, THAT THEY WERE ULTIMATELY
21 UNSUCCESSFUL, I HAVE HANDED UP TO YOU THEIR MOTION TO AMEND.
22 I'M SORRY. YOU WANT ME TO...

23 THE COURT: YOU'RE FINE.

24 MR. TOLLISON: I'VE HANDED UP TO YOU THE MOTION TO
25 AMEND THAT THEY HAVE FILED. IT WAS ECF NUMBER 115 AND IT WAS

1 FILED ON NOVEMBER 20TH OF 2013. NOW, ALL OF THE DEPOSITIONS
2 HAD TAKEN PLACE AT THIS TIME OTHER THAN MR. CAVALIER, AND
3 MRS. BUSSEY'S DEPOSITION TWICE HAD OCCURRED. AND I WANT YOU
4 TO, IF YOU COULD, REFER TO PARAGRAPH SEVEN WHICH IS ON PAGE
5 FOUR, AND THIS IS WHAT THE PLAINTIFF CITED IN THEIR BRIEF IN
6 THE SECOND SENTENCE. COUNSEL FOR -- WELL, LET ME GO -- JUST
7 START AT PARAGRAPH SEVEN.

8 BEGINNING IN THE JULY DEPOSITION OF MR. BOYKIN'S
9 CO-WORKERS AT COLUMBIA YAMAHA AND COLUMBIA -- AND SAYS IT
10 TWICE -- AND OTHER PERSONNEL WERE TAKEN. INCLUDED IN THESE
11 DEPS WAS KEREN BUSSEY WHO WAS DEPOSED IN JULY OF '13 AND
12 FINALIZED IN AUGUST OF '13. COUNSEL FOR THE PLAINTIFFS AFTER
13 THE DEPOSITIONS IN JULY OF '13 WAS PROVIDED THE OPPORTUNITY
14 TO INSPECT AND VIEW THE COLUMBIA YAMAHA FACILITY. DURING
15 THIS INSPECTION PLAINTIFFS' COUNSEL DISCOVERED A PARTS
16 WASHER.

17 AND THEN IT GOES ON FOR A LITTLE BIT. AND THEN IF I
18 COULD REFER YOU TO WHERE THE, HOWEVER, SENTENCE AT THE
19 BOTTOM. THIS IS WHAT PLAINTIFFS' COUNSEL WROTE. HOWEVER, AT
20 HER AUGUST DEPOSITION -- NOW HE'S GIVING CREDIBILITY TO THE
21 AUGUST DEPOSITION IN THIS BRIEF BUT MAKES NO REFERENCE TO IT
22 IN THE BRIEF BEFORE YOUR HONOR ON THE MOTION TO STRIKE.

23 HE SAYS, HOWEVER, AT HER AUGUST DEPOSITION THAT SHE HAD
24 HAD THE OPPORTUNITY TO SPEAK WITH SOME OF THE MECHANICS ABOUT
25 THE PARTS WASHER AND HOW IT WAS SERVICED OVER THE YEARS. SHE

1 EXPLAINED THAT PRIOR TO 2003, SAFETY KLEEN SERVICED AND
2 SUPPLIED THE SOLVENT FOR THE PARTS WASHER, THAT BETWEEN
3 2008 -- I MEAN STRIKE -- EXCUSE ME -- AND BETWEEN 2003 AND
4 2008 PROVIDENCE ENVIRONMENTAL SERVICED THE PARTS WASHER.

5 NOW, HERE'S THE KICKER. IT GOES ON TO SAY, AND AFTER
6 2008 DIVERSIFIED SERVICED THE PARTS WASHER. SO, IN 2013 THE
7 VERY PLEADING THAT WAS OFFERED TO THIS COURT AFTER THE VERY
8 DEPOSITIONS WE'RE REFERRING TO NOW, THE PLAINTIFF TOOK THE
9 POSITION THAT IN 2008 DIVERSIFIED SUPPLIED THE PARTS WASHER,
10 NOT ACUITY, NOT ZEP. IT TOOK A FORMAL POSITION WITH THE
11 COURT THAT IT WAS DIVERSIFIED, WHICH I THINK IS MORE
12 ACCURATE.

13 THEN IF YOU LOOK AT PARAGRAPH -- IF YOU LOOK AT
14 PARAGRAPH 10, IT SAYS, PLAINTIFFS' COUNSEL CONTACTED
15 MR. CAVALIER AND HE CONFIRMED THAT PROVIDENCE ENVIRONMENTAL
16 DID IN FACT PROVIDE REPLACEMENT BARRELS OF SOLVENT FOR USE IN
17 COLUMBIA PARTS WASHER FROM 2003 TO 2008.

18 I WILL JUST FLAG FOR THE COURT THAT IN PAGE EIGHT
19 THERE'S TWO REFERENCES TO -- IN THE SUPPORT THEY ARE OFFERING
20 FOR THIS MOTION. THERE'S TWO REFERENCES ON PAGE EIGHT, ONE
21 REFERENCE ON PAGE NINE. MULTIPLE TIMES THEY REFER TO
22 MRS. BUSSEY -- IN SUPPORT OF THEIR ARGUMENT, THEY REFER TO
23 MRS. BUSSEY'S AUGUST DEPOSITION. IN HER AUGUST DEPOSITION WE
24 LEARNED THAT. IN HER AUGUST DEPOSITION WE CONCLUDED THAT.
25 BUT THERE'S NO REFERENCE HERE IN ANYTHING BY THE PLAINTIFF TO

1 THE AUGUST DEPOSITION WHICH IS THE VERY CLARITY THAT WAS
2 GIVEN TO THE PARTS WASHER HISTORY THAT WAS DIVERSIFIED IN
3 2008, NOT ACUITY.

4 THE REST OF THE FACTORS, YOUR HONOR, ARE LAID OUT IN THE
5 BRIEF. THEY ARGUE WE HAD THE ABILITY TO CURE. I JUST -- I
6 DON'T KNOW HOW I WOULD HAVE THE ABILITY TO CURE THAT WHICH I
7 DID NOT KNOW ABOUT. HOW WOULD I HAVE CURED THE ACUITY PARTS
8 WASHER ISSUE IN DR. STEWART'S DEPOSITION OR DR. HARRISON'S
9 DEPOSITION WHEN THEY SAID, WE DON'T -- WE ARE NOT SAYING
10 ACUITY WAS IN THE GAME IN 2008 AND 2009.

11 THE EXTENT OF DISRUPTION IS A FACTOR, YOUR HONOR, AND I
12 WOULD JUST LEAVE IT TO YOU TO SURMISE HOW GREAT THAT COULD
13 BE. I THINK IF YOUR HONOR SAID, STOP, WE ARE GOING TO REOPEN
14 THE CASE, LET'S GO DO FACT DISCOVERY BECAUSE SEE THE -- THE
15 PLAINTIFF HAS NEVER DONE -- I'M NOT SAYING THEY HAD TO -- BUT
16 IF THIS ISSUE IS THAT IMPORTANT, THEY HAVE NEVER DONE
17 DISCOVERY OF THE EMPLOYER FORMALLY. THEY HAVE NOT TAKEN THE
18 30(B)(6) OF THE EMPLOYER. THEY DID NOT ISSUE A SUBPOENA
19 DUCES TECUM. I THINK THEY ORIGINALLY ACQUIRED RECORDS
20 THROUGH THE RIGHT TO KNOW ACT, BUT THEY'VE NEVER FORMALLY DID
21 DISCOVERY OF THE EMPLOYER.

22 THEY HAVE HAD THE ABILITY TO DO THIS. IF THEY WANTED TO
23 MAKE AN ISSUE ABOUT THE ACUITY PARTS WASHER, THEY HAD THE
24 ENTIRE TIME TO DO THAT. BUT YOU CAN'T HIT US IN THE BACK OF
25 THE HEAD IN 2015 FOR THE FIRST TIME WITH, OH, BY THE WAY,

1 WITHOUT ANY EXPLANATION. AND AS YOU NOTICED IN THE FACTORS
2 THEY LEFT -- THEY LEFT THE FIFTH ONE ALONE, THE EXPLANATION
3 FOR WHY IT'S TAKEN THIS LONG, AND THEY DON'T -- THEY CANNOT
4 OFFER ONE.

5 AND IF I KNEW IN JULY OF '13 THAT WHICH I COULD NOT HAVE
6 KNOWN, BUT IF I -- IF THEY TAKE THE POSITION THAT I DID KNOW
7 IN JULY, WELL THEN SO DID THEY, AND THEY COULD HAVE -- THEY
8 COULD HAVE HAD STEWART AMEND THEIR REPORT, THEY COULD HAVE
9 HAD STEWART SPEAK TO IT IN THE DEPOSITION, AND LIKEWISE THE
10 SAME FOR HARRISON.

11 SO IN SUMMARY, YOUR HONOR, I APPRECIATE YOUR INDULGENCE.
12 I JUST WANTED TO GO THROUGH A LITTLE -- THIS PARTS WASHER HAS
13 MORE OF A HISTORY THEN PROBABLY JUST GET TEED UP NECESSARILY
14 IN THE MOTIONS. WE HAVE BEEN TALKING ABOUT THE PARTS WASHER
15 FOR QUITE SOME TIME. IT COMES UP IN EVERY DEPOSITION. AND
16 THERE HAS BEEN NO EVIDENCE, NO PART OF THE RECORD, NO
17 DISCERNMENT BY THE EXPERTS, NO OPINION BY THE EXPERTS UNTIL
18 THIS AFFIDAVIT THAT ACUITY'S PARTS WASHER FLUID WAS IN THE
19 GAME.

20 AND I WOULD JUST RESPECTFULLY ASK THAT YOUR HONOR STRIKE
21 OUR -- WELL, I'LL LET THEM SPEAK TO THE ENTIRE AFFIDAVIT, BUT
22 IF YOU'RE GOING TO KEEP ANY PARTS OF THE AFFIDAVIT IN OR
23 ALLOW ANY PARTS OF IT TO SURVIVE, JUST MOST RESPECTFULLY
24 WOULD STRIKE THE REFERENCES TO ACUITY. THANK YOU, YOUR
25 HONOR.

1 THE COURT: THANK YOU VERY MUCH, MR. TOLLISON. WHO
2 IS GOING TO SPEAK ON BEHALF OF SAFETY KLEEN?

3 MR. ALOST: YOUR HONOR, MY NAME IS WES ALOST.
4 WOULD YOU LIKE TO HEAR PLAINTIFFS' RESPONSE NOW OR HEAR OUR
5 ARGUMENT AND THEN--

6 THE COURT: WHAT MAKES SENSE? DO YOU WANT TO SPEAK
7 SPECIFICALLY IN RESPONSE OR YOU WANT TO WAIT AND ADDRESS ALL
8 THE ISSUES?

9 MR. JENSEN: I'M HAPPY TO DO IT EITHER WAY, YOUR
10 HONOR. I WILL SAY IN RELATION TO THAT ISSUE, I DO REGARD
11 ACUITY'S MOTION WITH RESPECT TO THE AFFIDAVIT TO BE DIFFERENT
12 IN CHARACTER FROM SAFETY KLEEN'S. IT MIGHT MAKE MORE SENSE
13 FOR ME TO ADDRESS THAT NOW IN LIGHT OF THAT.

14 THE COURT: SURE. YOU MIND, MR. ALOST?

15 MR. ALOST: NO, YOUR HONOR. I WANT TO BE COURTEOUS
16 TO COUNSEL AND ALLOW HIM AN OPPORTUNITY TO DO WHAT HE NEEDED
17 TO DO.

18 THE COURT: WELL, THANK YOU VERY MUCH. IF YOU WILL
19 PLEASE STATE YOUR NAME FOR THE RECORD.

20 MR. JENSEN: STEVE JENSEN FOR THE PLAINTIFF, YOUR
21 HONOR. AND MAY IT PLEASE THE COURT. SO, THIS ISSUE IS A
22 VERY DISCREET ISSUE. AND YOU KNOW, THERE'S AN OBVIOUS WAY IN
23 WHICH IT IS QUITE DIFFERENT THAN MOST OF THE OTHER ISSUES
24 THAT ARE BEFORE THE COURT TODAY AND IN THE -- THE WAY IN
25 WHICH I THINK THAT IS OBVIOUS IS THAT IT IS WHAT I WOULD CALL

1 A FAIRLY PURE FACTUAL ISSUE.

2 IN OTHER WORDS, IS THERE ANY EVIDENCE FROM THE DISCOVERY
3 MATERIALS THAT HAVE BEEN REVIEWED BY THE EXPERTS AND ARE NOW
4 BEFORE THE COURT ON THIS RECORD, IS THERE ANY EVIDENCE THAT
5 IN FACT IN THE 2008, 2009 TIME PERIOD ZEP WAS THE
6 MANUFACTURER, SUPPLIER OF THE SOLVENT THAT WAS BEING USED IN
7 THE PARTS WASHING MACHINE AT THE COLUMBIA POWER SPORTS
8 LOCATION.

9 AND THE ANSWER TO THAT, YOUR HONOR, I BELIEVE IS YES,
10 THERE IS SOME EVIDENCE THAT AT LEAST THAT SUPPORTS THAT
11 INFERENCE THAT A JURY SHOULD BE ENTITLED TO MAKE, NUMBER ONE.
12 AND NUMBER TWO, BECAUSE THIS IS REALLY WHAT AGAIN I WOULD
13 DESCRIBE AS A PURE FACTUAL ISSUE, IT'S NOT ABOUT SO MUCH I
14 DON'T THINK THE EXPERT'S OPINIONS ESPECIALLY IN LIGHT OF THE
15 FACT -- AND THIS MAY OR MAY NOT BE CLEAR TO THE COURT AT THIS
16 POINT -- DR. STEWART DID NOT ATTEMPT IN HIS ANALYSES TO
17 CONDUCT A DEFENDANT-SPECIFIC DOSE OF BENZENE FOR EACH
18 DEFENDANT.

19 WHAT HE DID INSTEAD WAS HE DID SPECIFIC ANALYSES BY TIME
20 PERIOD AND BY JOB TASK INCLUDING USE OF THE PARTS WASHING
21 MACHINE. AND SO, YOU CAN DERIVE OR YOU CAN -- BY LOOKING AT
22 DR. STEWART'S RESULTS OF HIS MODELING OF EXPOSURES TO
23 BENZENE, YOU KNOW, TAKE OUT THE EXPOSURES FROM 2008, 2009
24 BASED ON PARTS WASHING, USE OF THE PARTS WASHER AND
25 ACTIVITIES RELATED TO PARTS WASHING FOR MR. BOYKIN. AND YOU

1 CAN DO THAT AND HE -- HE'S GOT THAT DATA, THEY HAVE GOT THAT
2 DATA.

3 BUT WHAT HE SAYS IN HIS REPORT -- AND I THINK THAT MR.
4 TOLLISON HAS ACCURATELY DESCRIBED HIS REPORT, ALTHOUGH I MAY
5 WANT TO GO UP TO THE ELMO AND GO OVER IT IN A LITTLE MORE
6 DETAIL IN A MOMENT IS, YOU KNOW, IT'S NOT -- YOU CANNOT
7 CONCLUSIVELY DETERMINE FROM THE PERIOD 2003 THROUGH 2009 WHO
8 THE SUPPLIER OF THE SOLVENT WAS.

9 AND MR. TOLLISON HAS ALSO ACCURATELY DESCRIBED FOR YOU
10 AFTER SAFETY KLEEN STOPPED BEING THE ENTITY THAT BOTH
11 SUPPLIED THE SOLVENT AND SERVICED THE PARTS WASHER -- AND
12 THOSE ARE TWO SEPARATE JOBS, RIGHT? I MEAN, THERE'S A
13 COMPANY THAT COMES OUT, TAKES THE DIRTY SOLVENT THAT HAS BEEN
14 USED IN THAT BARREL THAT IS THE PARTS WASHING MACHINE, TAKES
15 IT BACK AND REPLACES IT WITH NEW SOLVENT.

16 WHETHER THAT COMPANY IS ALSO THE MANUFACTURER AND SELLER
17 OF THAT SOLVENT IS A SEPARATE ISSUE. SAFETY KLEEN DID BOTH
18 THINGS. IN OTHER WORDS, IT WAS THEIR SOLVENT AND THEY WERE
19 THE ONES WHO CAME OUT THERE AND SERVICED THE MACHINE.

20 DURING LATER TIMEFRAMES, AS MR. TOLLISON HAS ALREADY
21 SPOKE TO, AFTER SAFETY KLEEN IS OUT OF THE PICTURE, YOU HAVE
22 GOT FIRST PROVIDENCE FROM 2003 TILL ABOUT 2007 OR 2008 IS OUT
23 THERE, BUT YOU KNOW, THE TESTIMONY WAS, AS I UNDERSTAND IT,
24 AND MR. TOLLISON WILL CORRECT ME IF I'M WRONG ABOUT THIS, BUT
25 AS I UNDERSTAND IT FROM PROVIDENCE, YES, WE WENT OUT THERE,

1 WE SERVICED THE MACHINE, WE TAKE AWAY THE SOLVENT, BRING NEW
2 SOLVENT, BUT WE WERE NOT -- WE WERE NOT THE ENTITY THAT WAS
3 THE SOLVENT SELLER.

4 AND I'M LESS CLEAR FRANKLY FROM THE RECORD -- I DON'T
5 THINK THE RECORD CLEARLY REFLECTS EXACTLY WHAT HAPPENS TODAY
6 AT COLUMBIA POWER SPORTS WITH RESPECT TO DIVERSIFIED. TODAY
7 MRS. BUSSEY'S TESTIMONY IS FAIRLY CLEAR THAT DIVERSIFIED IS
8 THE ENTITY THAT SERVICES THE PARTS WASHER AT THE WORK SITE.

9 IT'S LESS CLEAR WHETHER TODAY DIVERSIFIED IS THE -- IS
10 THE ENTITY THAT IS THE PRODUCER OF THE SOLVENT ITSELF. IT
11 DOESN'T APPEAR TO BE SO. SHE NEVER INDICATES THAT AND IN
12 FACT, AS BOTH MR. TOLLISON SAID AND IN DR. STEWART'S REPORT
13 REFLECTS, IT'S NOT CLEAR WHO THE SOLVENT MANUFACTURER IS
14 AFTER 2003.

15 THE COURT: WELL, DOES IT MATTER WHAT THE
16 MANUFACTURER OF THE SOLVENT IS TODAY? IS IT THE RELEVANT
17 TIME PERIOD?

18 MR. JENSEN: WELL, NOT DIRECTLY RELEVANT, YOUR
19 HONOR. THERE'S -- I THINK THERE'S A VALID QUESTION, AND I'M
20 ABOUT TO GET TO THIS. IF I MIGHT --

21 THE COURT: SURE.

22 MR. JENSEN: -- USE THE ELMO.

23 THE COURT: SURE.

24 MR. JENSEN: WHAT I'M ABOUT TO GET TO, YOUR HONOR,
25 IS THAT THERE IS TESTIMONY FROM MRS. BUSSEY'S AUGUST 2013

1 DEPOSITION. AND I WILL SEE IF I CAN ZOOM IN HERE. THIS IS
2 DR. STEWART'S REPORT. IT IS THE PAGE -- PAGE 10 OF HIS
3 REPORT THAT MR. TOLLISON WAS READING FROM EARLIER. AND IT
4 PROVIDES THE BACKGROUND FOR WHAT -- OR THE SUMMARY BY DR.
5 STEWART OF WHAT'S KNOWN FROM THE CO-WORKER TESTIMONY, AND I
6 DON'T -- I DON'T DISAGREE THIS -- THESE FACTS HAVE NOT
7 CHANGED. THERE'S NOT BEEN ANY FURTHER DISCOVERY ABOUT THIS
8 ISSUE.

9 BUT WHAT HE SAYS IS THAT MRS. BUSSEY STATED THAT
10 DIVERSIFIED IS THE COMPANY THAT CURRENTLY SERVICES THE PARTS
11 WASHER AND THAT SHE BELIEVES THEY STARTED AFTER MR. BOYKIN'S
12 DEATH AND THAT ZEP MANUFACTURED THE SOLVENT IN THE PARTS
13 WASHER IN 2010.

14 SO HERE WE ARE ONE YEAR AFTER MR. BOYKIN'S DEATH AND
15 THERE IS TESTIMONY FROM THE AUGUST 2013 DEPOSITION OF
16 MRS. BUSSEY THAT IS CITED RIGHT HERE IN DR. STEWART'S REPORT
17 THAT AT LEAST AS OF 2010 SHE BELIEVES -- AND THAT'S THE WORD
18 THAT SHE USES AT PAGE 270 OF HER DEPOSITION -- SHE BELIEVES
19 THAT IN 2010 ZEP WAS THE MANUFACTURER OF THE SOLVENT THAT
20 DIVERSIFIED WAS BRINGING OUT TO THE PARTS WASHER.

21 NOW, THAT DOESN'T RESOLVE THE QUESTION DIRECTLY OF WHAT
22 HAPPENED OR WHO MANUFACTURED THE SOLVENT IN 2008, 2009. AND
23 IT'S NOT STATED IN TERMS OF, I'M SURE THAT THAT'S TRUE, I'M
24 CERTAIN THAT IT'S TRUE, IT'S CONCLUSIVELY TRUE. AND I THINK
25 THAT THE REST OF DR. STEWART'S STATEMENTS ABOUT THIS REFLECT

1 THAT. I MEAN, HE'S SAYING, LOOK, SHE SAYS SHE THINKS IN 2010
2 THAT IT WAS ZEP, SHE DOESN'T KNOW WITH CERTAINTY WHO IT WAS
3 FROM 2003 TO 2008, SO WE CAN'T CONCLUSIVELY DETERMINE THAT.

4 *THE COURT:* WELL, ISN'T -- IF INSTEAD YOU COULD --
5 INSTEAD OF DR. STEWART'S REPRESENTATION OF WHAT--

6 *MR. JENSEN:* YEAH. CAN WE POINT TO THE ACTUAL
7 TESTIMONY.

8 *THE COURT:* YES, FROM MRS. BUSSEY'S DEPOSITION.
9 AND IF IT'S THAT PART REGARDING SHE RECALLED RECEIVING AND
10 PAYING BILLS FOR THE SOLVENT FOR THE PARTS WASHER FLUID FROM
11 ZEP, I THINK THAT WAS THE JULY TESTIMONY. IS THAT WHAT
12 YOU'RE REFERRING TO?

13 *MR. JENSEN:* NO. I'M REFERRING INSTEAD TO THE
14 AUGUST TESTIMONY WHICH IS WHAT IS CITED IN DR. STEWART'S
15 REPORT THERE. IF I COULD NOW GO TO THE PROJECTOR, PLEASE.
16 PARTS WASHER. COMPUTER I GUESS. OKAY.

17 *THE COURT:* I GUESS WHAT I'M LOOKING AT IS VOLUME
18 TWO OF THE--

19 *MR. JENSEN:* YEAH. IF YOU TURN TO -- DO YOU HAVE
20 THE DEPOSITION IN FRONT OF YOU, YOUR HONOR?

21 *THE COURT:* I HAVE MY NOTES FROM THE DEPOSITION.
22 I'M AT 277 AT EIGHT THROUGH 15 WHICH SAYS, OKAY, TERRIFIC, SO
23 I GUESS THE BOTTOM LINE IS AFTER '03 WE STILL DON'T KNOW,
24 REALLY KNOW, WHO OR WE DON'T KNOW WHO MANUFACTURED THE
25 SOLVENT THAT WAS USED IN THE PARTS WASHER. AND THE ANSWER

1 IS, NO.

2 AND THEN THE QUESTION, WE DON'T KNOW THE ANSWER TO THAT
3 QUESTION. AND SHE SAYS, I DO NOT. SO I GUESS IF THERE'S
4 SOMETHING --

5 MR. JENSEN: YES.

6 THE COURT: -- THAT CLARIFIES HER TESTIMONY--

7 MR. JENSEN: WELL, THERE'S SOMETHING THAT'S
8 ARGUABLY IN CONTRADICTION WITH THAT A FEW PAGES EARLIER IN
9 HER DEPOSITION. SO PAGE 270 OF THE SAME DEPOSITION LINES
10 SEVEN THROUGH 10. AND WHAT THOSE READ IS, QUESTION, SO 2010
11 THE SOLVENT WAS MANUFACTURED BY ZEP; IS THAT CORRECT?
12 THERE'S AN OBJECTION. AND THEN THE WITNESS ANSWERS, I
13 BELIEVE SO.

14 AND SO, SHE LATER GOES ON IN THE TESTIMONY OF BOTH
15 LEADING UP TO WHAT YOUR NOTES REFLECT AND THEN IN THAT
16 TESTIMONY ON PAGE 277 THAT YOU JUST DISCUSSED, YOUR HONOR,
17 SHE SAYS, I'M NOT SURE, BUT -- BUT SHE SAYS -- CLEARLY SHE
18 SAYS, I BELIEVE IT WAS ZEP IN 2010. AND I -- I BELIEVE, YOUR
19 HONOR, THAT IN LIGHT OF THE WAY THIS TIMELINE PLAYS OUT WHERE
20 FROM 2003 TO 2008 SHE -- THE TESTIMONY OR THE RECORD REFLECTS
21 THAT PROVIDENCE WAS SERVICING, AND SHE MAKES IT QUITE CLEAR
22 AT ONE POINT IN HER DEPOSITION SHE DID NOT THINK IT WAS ZEP
23 DURING THAT PROVIDENCE TIMEFRAME.

24 THEN IN 2008 WE START HAVING DIVERSIFIED COME ON THE
25 SCENE AND DIVERSIFIED IS STILL ON THE SCENE TODAY. AND HER

1 TESTIMONY IS -- EQUIVOCAL THOUGH IT IS -- IT IS ENOUGH TO
2 SUPPORT AN INFERENCE THAT AT LEAST AS OF 2010 IT WAS ZEP, SHE
3 BELIEVES IT WAS ZEP. GIVEN THAT THERE WAS THAT CHANGE IN
4 SERVICER IN 2008, IT IS FAIR INFERENCE I BELIEVE FOR THE JURY
5 TO MAKE THAT THE MOST LIKELY SUPPLIER OF THE SOLVENT, THE
6 MANUFACTURER OF THE SOLVENT THAT DIVERSIFIED WAS COMING OUT
7 AND PROVIDING TO COLUMBIA POWER SPORTS WAS IN FACT ZEP SLASH
8 ACUITY.

9 THE COURT: SO YOUR ARGUMENT IS THAT HER TESTIMONY
10 A FEW PAGES EARLIER STATES THAT SHE BELIEVES THAT IN 2010
11 AFTER THE DECEDENT'S DEATH THAT THE SOLVENT WAS MANUFACTURED
12 BY ZEP. BUT WHEN SHE A FEW PAGES LATER IS DIRECTLY ASKED, SO
13 WE DON'T KNOW WHO THE MANUFACTURER WAS AFTER 2003, AND SHE
14 SAYS, NO, THAT THOSE ARE COMPATIBLE BECAUSE SHE'S
15 EQUIVOCATING OR -- I THINK THAT WHAT THE DEFENDANTS WOULD
16 ARGUE IS THAT SHE'S CLARIFIED THE LATER -- YOU KNOW, WE ALL
17 DO THIS IN DEPOSITIONS, YOU KNOW, YOU START ASKING QUESTIONS
18 AND THEN THE PERSON SAID, YEAH, I THINK SO, OH, AND THEN
19 LATER ON IT'S, OH NO, YEAH, I DON'T KNOW, I DON'T KNOW.

20 SO, THERE'S A DISCREPANCY BUT THE LATER TESTIMONY IS
21 ACTUALLY THE MOST CLARIFYING OR ACCURATE. BUT YOU'RE SAYING
22 THAT THAT SHOULDN'T BE THE INTERPRETATION OF MRS. BUSSEY'S
23 DEPOSITION.

24 MR. JENSEN: I THINK IT'S ONE INTERPRETATION, YOUR
25 HONOR. I THINK ANOTHER FAIR INTERPRETATION THAT A JURY

1 SHOULD BE ENTITLED TO MAKE IS THAT WHAT SHE WAS DOING WITH
2 HER LATER TESTIMONY A FEW PAGES DOWN THE ROAD WAS SAYING,
3 WELL, I CAN'T SAY FOR SURE, I'M NOT SURE. THAT'S NOT THE
4 STANDARD, THOUGH. THE STANDARD IS MORE LIKELY THAN NOT FOR
5 PURPOSES OF PROVING THIS FACT -- FACTUAL ISSUE IN THE CASE.

6 THE COURT: WELL, DID SHE SAY I'M NOT SURE OR DID
7 SHE SAY I DON'T KNOW?

8 MR. JENSEN: WELL, SHE SAID SHE -- I DON'T KNOW.
9 WELL, LET'S SEE WHAT SHE SAID. I DON'T WANT TO... OKAY. SO
10 ON 277 -- I THINK THIS IS WHAT YOU WERE REFERENCING JUST A
11 MOMENT AGO FROM YOUR NOTES, YOUR HONOR -- SAYS, SO I GUESS
12 THE BOTTOM LINE IS AFTER '03 -- THIS IS THE QUESTION -- SO
13 THE BOTTOM LINE IS AFTER '03 WE STILL DON'T REALLY KNOW WHO
14 OR WE DON'T KNOW WHO MANUFACTURED THE SOLVENT THAT WAS USED
15 IN THE PARTS WASHER. ANSWER: NO. QUESTION: WE DON'T KNOW
16 THE ANSWER TO THAT QUESTION. I DON'T -- I DO NOT.

17 AND SO SHE'S SAYING, I DON'T KNOW. WE DON'T KNOW,
18 HOWEVER, FROM THAT TESTIMONY WHAT LEVEL OF CERTAINTY SHE WAS
19 ATTACHING TO THAT ISSUE AT THAT POINT. WE DO KNOW THAT SIX
20 PAGES EARLIER IN THE DEPOSITION OR SEVEN PAGES EARLIER IN THE
21 DEPOSITION THAT SHE SAID SHE BELIEVED BUT ACKNOWLEDGED SOME
22 UNCERTAINTY ASSOCIATED WITH IT THAT AT LEAST AS OF 2010 THE
23 MANUFACTURER WAS ZEP.

24 THIS IS NOT NECESSARILY INCONSISTENT WITH THAT, AND IN
25 FACT IN THE FULL CONTEXT OF THAT WHOLE DISCUSSION, YOUR

1 HONOR, WHERE IN ANOTHER POINT ON PAGE 276 -- I THINK IT'S
2 276, LET ME MAKE SURE OF THAT -- WELL, I THINK IF WE -- TO
3 GET FULL CONTEXT, YOUR HONOR, I WOULD START AT THE BOTTOM OF
4 PAGE 273 AT LINE 24. AND THERE MR. FRIELING, MY PARTNER,
5 ASKED MRS. BUSSEY, AND DURING THAT PERIOD OF TIME THAT
6 PROVIDENCE SERVICED THAT PIECE OF EQUIPMENT -- REFERRING TO
7 THE PARTS WASHER -- DO YOU RECALL ANY OTHER SOLVENTS USED
8 OTHER THAN ZEP? AND THE WITNESS ANSWERS, CAN I ASK A
9 QUESTION? OF COURSE. ANSWER, IF I HAVE ASKED SOMEBODY ELSE
10 THAT SAME QUESTION AND THAT INFORMED ME THAT, YES, WE USED
11 SOMETHING OTHER THAN ZEP -- THAT WAS HER QUESTION TO COUNSEL.

12 QUESTION -- AND THEN COUNSEL RESPONDS, YOU CAN TELL.
13 AND THEN HER ANSWER IS, AS FAR AS I KNOW THERE WAS WHOEVER
14 WAS -- WHENEVER WAS WHEN PROVIDENCE WAS SERVICING, THERE WAS
15 A SWITCH-OUT OF THE CHEMICAL, LIKE THEY WOULD TAKE IT OUT,
16 THE WHOLE BARREL, AND PUT ANOTHER BARREL, BUT I DON'T KNOW
17 WHAT, I DON'T KNOW WHEN THEY DID IT IF WHO ALL DID IT. I
18 JUST KNOW THAT IT WAS DONE.

19 SO, IN THAT CONTEXT SHE HAD THE OPPORTUNITY TO GO BACK
20 AND SAY, WELL, I DIDN'T MEAN TO SAY THAT ZEP WAS THE
21 SUPPLIER. BUT LATER ON IN FAIRNESS, YOUR HONOR, AT 276 LINES
22 19 THROUGH 22 SHE GETS ASKED AGAIN DIRECTLY, SO THE ZEP
23 MATERIAL, DO YOU KNOW IF THE ZEP MATERIAL WAS USED IN THE
24 PARTS WASHER? AND HER ANSWER IS, NOT FOR SURE. OKAY. SO
25 THAT'S 276, LINES 19 THROUGH 22.

1 THE COURT: AND SHE FOLLOWS UP AND SAYS, BUT GO ASK
2 MY HUSBAND AND GO ASK NATE. AND THEN I THINK THE DEFENDANTS
3 ARE ARGUING THAT THEY DID AND THEY DIDN'T KNOW. AND SO, I
4 GUESS YOUR ARGUMENT IS THAT HER--

5 MR. JENSEN: HER EQUIVOCAL STATEMENT ABOUT 2010 IS
6 NOT MUCH BUT ENOUGH FOR A JURY TO GET THERE ABOUT 2008 AND
7 2009 WHEN YOU PUT THAT STATEMENT IN THE FULL CONTEXT OF THE
8 TIMELINE OF -- SO AFTER 2003 FROM 2003 TO '07 IT WAS
9 PROVIDENCE, FROM 2008 TO THE PRESENT IT'S DIVERSIFIED. AT
10 SOME POINT IN TIME DIVERSIFIED WAS PUTTING ZEP, SHE BELIEVES,
11 PARTS WASHER SOLVENT INTO THE PARTS WASHER. IT'S A FAIR
12 INFERENCE THAT THAT ZEP PARTS WASHER SOLVENT WAS GOING IN AT
13 AN EARLIER TIMEFRAME AS WELL. THAT'S WHERE WE ARE.

14 THE COURT: DID YOU TAKE A 30(B)(6) WITNESS
15 DEPOSITION OF YAMAHA, OF THE EMPLOYER ON THIS ISSUE?

16 MR. JENSEN: I DON'T KNOW IF WE FORMALLY TOOK A
17 30(B)(6) DEPOSITION ON THAT ISSUE OR NOT, YOUR HONOR. WHAT I
18 DO KNOW IS WE BELIEVED MRS. BUSSEY, AS THE PERSON IN CHARGE
19 OF PARTS ACQUISITION, WAS THE PERSON WITH MOST KNOWLEDGE. I
20 THINK IT WAS PROBABLY A 30(B)(6) NOTICE THAT HER -- THAT
21 APPLIED TO HER, BUT I DON'T KNOW THAT WITH CERTAINTY.

22 THE COURT: BUT THERE WAS NO OTHER INDIVIDUAL WHO
23 COULD BIND THE COMPANY ON THE ISSUE OF THE MANUFACTURER OF
24 THE SOLVENT PRIOR TO THE DECEDENT'S DEATH THAT -- FROM 2003
25 FORWARD.

1 MR. JENSEN: NOT TO MY KNOWLEDGE.

2 THE COURT: OKAY. ALL RIGHT. YOU MAY PROCEED. IS
3 THAT IT?

4 MR. JENSEN: UNLESS YOU HAVE ANY ADDITIONAL
5 QUESTIONS, YOUR HONOR, I THINK ON THAT ISSUE THAT'S ALL I
6 HAVE GOT TO SAY.

7 THE COURT: WELL, CAN I ASK YOU, MR. JENSEN, DO YOU
8 CONCEDE THAT THE INFORMATION CONTAINED IN THE AFFIDAVIT IS
9 NEW INFORMATION OR A SUPPLEMENTATION RENDERING A NEW OPINION?

10 MR. JENSEN: WELL, I THINK EVEN CALLING IT AN
11 OPINION IS SOMETHING OF A STRETCH BECAUSE IT'S REALLY A
12 PURELY FACTUAL ISSUE, YOUR HONOR. AND SO, NO, I DON'T
13 CONCEDE IT'S NEW BECAUSE IT REALLY COMES OUT OF EXACTLY THE
14 SAME TESTIMONY THAT IS REFERENCED IN DR. STEWART'S ORIGINAL
15 REPORT AT PAGE 10 THAT WE JUST WENT OVER.

16 THE COURT: SO, AS A SUPPLEMENTATION UNDER 26(E)
17 WOULD YOU SAY THAT'S WHAT--

18 MR. JENSEN: THAT'S A CLARIFICATION I THINK PROP --
19 THAT'S A PROPER CLARIFICATION I THINK UNDER 26(E).

20 THE COURT: WELL, CLARIFICATION INSINUATES THAT
21 THERE WAS SOMETHING INCORRECT THAT'S NOW BEING CORRECTED.
22 SO--

23 MR. JENSEN: SO SUPPLEMENTATION IS PROBABLY THE
24 BETTER WORD, YOUR HONOR. BUT YOU KNOW, IT'S -- IT'S NOT NEW
25 IN THE SENSE THAT THE UNDERLYING DATA OR EVIDENCE THAT

1 SUPPORTS IT WAS REFERENCED IN THE ORIGINAL REPORT.

2 THE COURT: OKAY. NOW, I GUESS IF IT WERE A
3 SUPPLEMENTATION UNDER 26(E), THEN YOU HAVE GOT THE DIFFICULTY
4 OF HAVING IT BE NOT ONLY UNTIMELY UNDER THE EXPERT WITNESS
5 DEADLINE IF IT DOESN'T BECOME A SUPPLEMENTATION, BUT AT ANY
6 RATE IF IT WERE A SUPPLEMENTATION, IT COMES AFTER THE
7 PRETRIAL DISCLOSURE DEADLINE; RIGHT?

8 MR. JENSEN: WELL, IT -- I...

9 THE COURT: UNDER 26B(B)(2).

10 MR. JENSEN: I THINK THAT'S RIGHT, YOUR HONOR. TO
11 THE EXTENT THAT YOU CONSIDER IT A SUPPLEMENTATION, THEN I
12 THINK THAT'S RIGHT. AND THEN, YOU KNOW, THE EXTENT OF THE
13 PREJUDICE THAT ARISES FROM THAT AND ALL THE FACTORS THAT --

14 THE COURT: SURE.

15 MR. JENSEN: -- GO INTO THAT HAVE TO THEN BE TAKEN
16 INTO ACCOUNT. TO ME THIS IS SOMETHING OF A TEMPEST IN A
17 TEAPOT JUST BECAUSE, YOU KNOW, IT EITHER IS ENOUGH EVIDENCE
18 TO GET TO A JURY ON THAT ISSUE OR IT ISN'T. I DON'T EVEN
19 THINK YOU NEED EXPERT TESTIMONY FRANKLY FOR THE JURY TO, YOU
20 KNOW, INFER THAT THE PARTS WASHING SOLVENT SUPPLIED BY ZEP
21 FROM THAT TESTIMONY BY MRS. BUSSEY -- AND WHO KNOWS EXACTLY
22 HOW THAT -- ALL THAT TESTIMONY PLAYS OUT AT TRIAL -- BUT
23 ASSUMING IT PLAYS OUT SIMILARLY, THAT THE, YOU KNOW, THAT'S
24 ENOUGH FOR THE JURY TO INFER BASED ON DR. HARRISON'S
25 TESTIMONY THAT, LOOK, HIS TOTAL BENZENE EXPOSURE CAUSED HIS

1 CANCER AND EVERY PIECE OF THAT BENZENE EXPOSURE CONTRIBUTED,
2 THEREFORE, IF THE JURY DETERMINES THAT ZEP PARTS WASHING
3 FLUID IS A PIECE OF THAT EXPOSURE, THEN YOU KNOW, IT'S ENOUGH
4 TO GET TO THE JURY ON THAT EVEN WITHOUT SPECIFIC EXPERT
5 TESTIMONY TALKING ABOUT EXPOSURES OF MR. BOYKIN TO ZEP PARTS
6 WASHING FLUID.

7 THE COURT: WELL, HOW IMPORTANT IS THIS INFORMATION
8 TO THE PLAINTIFFS' CASE?

9 MR. JENSEN: WELL, I THINK IT'S IMPORTANT --
10 IMPORTANT TO THE CASE AGAINST ACUITY, YOUR HONOR, BUT I DON'T
11 KNOW WHAT TO SAY BEYOND THAT.

12 THE COURT: OKAY. I GUESS THERE ARE TWO SIDES OF
13 THE SAME COIN. THE IMPORTANCE TO THE PLAINTIFF IS OFTEN THE
14 BASIS FOR THE SURPRISE OR THE PREJUDICE TO THE DEFENDANT, AND
15 SO I'M TRYING TO DETERMINE IF IT'S NOT THAT IMPORTANT TO THE
16 PLAINTIFF BUT IT'S A GREAT SURPRISE OR VERY PREJUDICIAL TO
17 THE DEFENDANT, THEN, YOU KNOW, ON THE SCALE, THEN THEY MIGHT
18 NOT BE EQUIVALENT. BUT IF IT'S VERY IMPORTANT TO THE
19 PLAINTIFF AND NOT VERY DAMAGING TO THE DEFENDANT, THEN THAT'S
20 ANOTHER ANALYSIS. BUT THERE'S NOTHING THAT --

21 MR. JENSEN: RIGHT.

22 THE COURT: -- CARE TO ADD ON THAT ISSUE.

23 MR. JENSEN: WELL, I WILL SAY THIS. REGARDING THE
24 CASE AGAINST ACUITY, THERE IS TESTIMONY AS MR. TOLLISON HAS
25 DESCRIBED IN THE RECORD THAT ABOUT USE BY MR. BOYKIN OF

1 AEROSOLS MADE -- AEROSOL PRODUCTS THAT CONTAIN
2 BENZENE-CONTAINING SOLVENTS MADE BY ZEP OR ACUITY.

3 THERE WILL BE AN ISSUE THAT IS NOT BEFORE YOU ABOUT THE
4 EXTENT OF THOSE EXPOSURES AND WHETHER THEY WERE SUFFICIENTLY
5 REGULAR, YOU KNOW, TO COUNT FOR PURPOSES OF CAUSATION, BEING
6 ENOUGH, SUFFICIENT EVIDENCE OF CAUSATION IN THE CONTEXT OF
7 ASBESTOS PRODUCTS LIABILITY CASES WHERE PRODUCT
8 IDENTIFICATION IS OFTEN A KEY ISSUE.

9 THERE IS A STANDARD THAT'S BEEN DEVELOPED IN THE FOURTH
10 CIRCUIT AND ADOPTED IN MANY COURTS AROUND THE COUNTRY ABOUT
11 THE FREQUENCY, REGULARITY AND PROXIMITY OF EXPOSURES TO THE
12 ASBESTOS FROM THAT PARTICULAR PRODUCT HAS TO BE SHOWN. THERE
13 IS AN ISSUE THAT -- NOT BEFORE THIS COURT -- BUT IS BEFORE
14 JUDGE LEWIS, AS I UNDERSTAND IT, ABOUT THE FREQUENCY,
15 REGULARITY AND PROXIMITY OF THE AEROSOL EXPOSURES TO ACUITY
16 SUCH THAT IT COULD END UP BEING THAT THE ONLY BASIS FOR
17 HOLDING ACUITY IN THE CASE ARE THE EXPOSURES TO ZEP PARTS
18 WASHING SOLVENT BECAUSE IT'S VERY CLEAR THAT THE PARTS WASHER
19 WAS USED ROUTINELY EVERY DAY.

20 THE COURT: OKAY. ALL RIGHT. THANK YOU VERY MUCH.

21 MR. JENSEN: THANK YOU.

22 THE COURT: ANY ARGUMENT, MR. TOLLISON, IN REPLY?

23 MR. TOLLISON: WELL, I WOULD JUST OFFER A COUPLE
24 REMARKS. THIS WHOLE -- IT'S FUNNY. THIS WHOLE ARGUMENT
25 TAKES ME BACK TO THE 80'S BEFORE WE HAD THE AMENDMENT TO THE

1 RULE WHERE, YOU KNOW, SOMEBODY JUST SAYS, WELL, YOU CAN JUST
2 DEAL WITH IT LATER, YOU CAN LET THE JURY DECIPHER THROUGH
3 THIS, JUST, YOU KNOW -- BUT WHEN WE DID THE AMENDMENT, HERE'S
4 THE THING. WE ARE NOT BEHIND DOOR NUMBER ONE.

5 DOOR NUMBER ONE WOULD BE I'M MOVING FOR SUMMARY JUDGMENT
6 ON THE ACUITY PARTS WASHER FLUID BECAUSE THEY CAN'T
7 ESTABLISH, YOU KNOW, THERE'S NO FACTS UPON WHICH THE
8 PLAINTIFF COULD MOVE FORWARD ON IT. AND THAT MIGHT BE A
9 LITTLE BIT OF A DIFFERENT, YOU KNOW -- NOW WALT, THIS -- YOU
10 MAY SAY LET THE JURY -- THAT'S NOT THE ISSUE. THE ISSUE IS
11 THEY DID AN EXPERT REPORT AND THEY'RE REQUIRED UNDER THE NEW
12 RULES TO ESSENTIALLY DISCERN THE FACTS AND UNDERLYING BASIS
13 AND THE OPINIONS WITHIN A REASONABLE DEGREE OF SCIENTIFIC --
14 AND THEY DIDN'T MENTION US NOWHERE.

15 AND THEN OUT OF NOWHERE COMES HARRISON'S REPORT IN
16 FEBRUARY OF '15 WHERE THERE IS NO FACTS IN THE RECORD TO
17 SUPPORT THIS, BUT WE DIDN'T GET THE CHANCE TO QUESTION HIM ON
18 IT, WE DIDN'T GET TO QUESTION -- CROSS-EXAMINE HIM ON IT, WE
19 DIDN'T GET THE CHANCE TO HAVE PAMELA WILLIAMS, OUR EXPOSURE
20 PERSON, DO AN EXPOSURE ASSESSMENT ON THIS, WE DIDN'T GET A
21 CHANCE TO HAVE DR. PYATT [PH] OR ANY OF OUR EXPERTS DO A
22 MEDICAL OPINION ON ANY OF THIS.

23 JUST WHEN IT'S ALL DONE, HERE COMES THIS OPINION FROM
24 HARRISON, BASED ON MY REVIEW OF THE TESTIMONY OF MR. BOYKIN'S
25 CO-WORKERS. WHO? BUT LEAVE THAT -- HIS EXPOSURE TO THE

1 PRODUCT OF WURTH, BEL-RAY, ACUITY PUTS WITHIN PAREN PARTS
2 WASHER SOLVENT -- HE DOESN'T MENTION ANYTHING ABOUT
3 AEROSOLS -- AND SAFETY KLEEN EACH SATISFY THE CRITERIA OF
4 FREQUENT, PROXIMATE AND REGULAR EXPOSURES.

5 NOW, YOU CANNOT ON THE LAST DAY WHEN THIS IS ALL SAID
6 AND DONE HIT ME WITH THAT WHEN I DIDN'T HAVE A CHANCE TO
7 QUESTION HARRISON ON ANY OF THAT. I MEAN, HE CAN ARGUE ALL
8 DAY, WELL, THERE'S ONE REFERENCE IN ONE DEPOSITION THAT
9 MAYBE, YOU KNOW, ZEP WAS THERE. BUT YOU CAN'T -- YOU
10 CAN'T -- YOU CAN'T UNDER THE RULES HAVE A REPORT UNDER RULE
11 26 AND THEN HAVE A DEPOSITION, TWO DEPOSITIONS, THAT FOLLOW
12 THAT.

13 AND WE WERE -- OUR EXPERTS RELY ON WHAT THEIR EXPERTS
14 ARE SAYING. THE WHOLE THING IS DONE. AND THEN COME UP WITH
15 THAT. IF HE'D HAVE PUT THAT IN THERE ORIGINALLY, JUDGE, WELL
16 CERTAINLY WE WOULD HAVE THEN DISSECTED THAT. SHOW ME WHERE
17 IN THE RECORD ARE A CO-WORKER SAID THAT ZEP HAD A PRODUCT
18 THERE OR ACUITY HAD A PRODUCT. THEN WE WOULD HAVE DISSECTED
19 THAT WITH HIM AND CROSS-EXAMINED HIM ON IT AND WE WOULD HAVE
20 BEEN WHERE WE WERE.

21 NOW, THE OTHER REMARK IS I JUST WANT TO BE CLEAR.
22 DIVERSIFIED WOULD HAVE NEVER SUPPLIED A ZEP PRODUCT. I
23 DON'T -- I HAVE NO IDEA WHERE THAT'S COMING FROM. THAT'S
24 NOWHERE IN THE RECORD. IT WOULD BE FACTUALLY IMPOSSIBLE. I
25 MEAN, DIVERSIFIED IS A COMPANY THAT GETS -- ZEP WAS A

1 SUPPLIER TO COLUMBIA YAMAHA.

2 THEY HAD TWO LOCATIONS. THEY HAD FERNANDINA ROAD AND
3 THEY HAD TWO NOTCH ROAD. AND SO ZEP HAD A PERSON -- I MEAN,
4 ZEP HAD A SALES AGENT THAT WOULD ASSIST -- FERNANDINA WOULD
5 BUY STUFF DIFFERENT THAN TWO NOTCH AND TWO NOTCH MIGHT HAVE
6 BOUGHT PRODUCT DIFFERENT THAN -- THAT'S PRETTY WELL IN THE
7 RECORD. KEREN SAYS, I'D PAY INVOICES BUT I'M NOT SURE WHO
8 HAD WHAT IN WHAT SPECIFIC LOCATION, I JUST PAID THE BILLS.

9 BUT THERE IS NO CLARITY AT ALL FOR THEM TO RENDER AT
10 THIS LAST MINUTE A NEW OPINION ABOUT A NEW PRODUCT. CLEARLY
11 IT'S A NEW OPINION. I THINK THAT'S -- CLEARLY WOULD
12 OTHERWISE BE A SUPPLEMENTATION. BUT WHAT KILLS ME, IT'S A
13 NEW PRODUCT AND THEY DON'T EVEN GIVE THE PRODUCT.

14 IF YOU LOOK AT STEWART'S OPINION AND HARRISON'S, ON
15 EVERYBODY ELSE'S THEY SPEAK TO SPECIFIC PRODUCTS. YOU CAN'T
16 JUST SAY ACUITY WITHIN PAREN PARTS WASHER FLUID. ACUITY
17 DOESN'T HAVE A PARTS WASHER FLUID. I MEAN, IF YOU'RE GOING
18 TO DO ANYTHING, AT LEAST SAY ZEP PRODUCT X, Y, Z, ZEP PRODUCT
19 A, B, C.

20 SO THEY JUST -- YOU KNOW WHAT HAPPENED. IN THE LAST
21 MINUTE THERE'S AN ANALYSIS AND GOES, WHOA WEE, WE'RE JUST OUT
22 THERE HOLDING ON BY A VINE TO ACUITY'S AEROSOL STUFF. WE GOT
23 TO FIX THAT. THAT'S WHAT HAPPENED. AND SO AT THE END OF THE
24 DAY, YOU KNOW, THERE'S SOME THAT ARE -- MEETING OF THE MINDS
25 WHO SAY, WELL, WE'VE GOT TO ADD A LITTLE FOOTNOTE HERE, WE'VE

1 GOT TO ADD A SENTENCE HERE AND WE'VE GOT TO MAKE SOME ISSUE
2 ABOUT IT.

3 I MEAN, I WOULD HAVE APPRECIATED IT MORE IF THEY HAD
4 JUST SAID UNDER RULE 26(E) WE ARE PUTTING THIS FRONT AND
5 CENTER, WE ARE GOING TO HAVE OUR EXPERTS AMEND OUR REPORTS IN
6 THE FOLLOWING. THEY DON'T EVEN DO THAT. YOU HAVE TO READ
7 THE REPORT ON THE MOTION TO EXCLUDE TO EVEN FIND WHAT THE
8 HECK IS THAT COMING FROM?

9 SO JUST IN ALL DUE RESPECT, I THINK THE COURT CAN SEE
10 THROUGH THAT. I JUST WOULD RESPECTFULLY ASK THAT THOSE TWO
11 THINGS BE STRICKEN AS RELATES TO THE PARTS WASHER FLUID.
12 THANK YOU.

13 THE COURT: THANK YOU, MR. TOLLISON. OKAY. I
14 GUESS WE ARE ON TO THE NEXT MOTION TO EXCLUDE. MR. ALOST, I
15 THINK THAT YOU WERE --

16 MR. ALOST: THANK YOU, YOUR HONOR.

17 THE COURT: -- HERE ON BEHALF OF SAFETY KLEEN.

18 MR. ALOST: THANK YOU, YOUR HONOR. WES ALOST. I'M
19 HERE ON BEHALF OF SAFETY KLEEN. I'M HERE WITH MY PARTNERS
20 JAMES MCGOLDRICK AND AMANDA KOCH WHO ARE GOING TO GET TO TALK
21 TO YOU A LITTLE BIT LATER TODAY.

22 YOUR HONOR, MR. TOLLISON SPENT A FAIR AMOUNT OF TIME
23 TALKING ABOUT THE HISTORY OF PARTS WASHERS AT TWO NOTCH ROAD
24 AND THE COLUMBIA POWER SPORTS FACILITY, AND I WANT TO JUST
25 ADDRESS THAT VERY QUICKLY SO THAT IT'S CLEAR WHAT SAFETY

1 KLEEN'S RECORDS SHOW IN THE CASE.

2 MR. BOYKIN WORKED AT COLUMBIA POWER SPORTS FROM 1981
3 TILL 2009. SAFETY KLEEN'S SERVICE RECORDS WHICH DOCUMENT THE
4 MATERIALS SAFETY KLEEN PROVIDED TO THE FACILITY AND THE TIMES
5 AND THE AMOUNTS OF MATERIAL THAT IT PROVIDED SHOW THAT IT
6 PROVIDED SAFETY KLEEN 105 SOLVENT FROM 1985 ROUGHLY TILL
7 DECEMBER 20, 1995. AND IT PROVIDED A SLIGHTLY DIFFERENT
8 PARTS WASHER MODEL AND A DIFFERENT SOLVENT, SAFETY KLEEN 150
9 SOLVENT, FROM DECEMBER 20, 1995 UNTIL MAY, 2004. AND THAT
10 NOMENCLATURE IS VERY IMPORTANT.

11 THE 105 SOLVENT AND A 150 SOLVENT DESIGNATION HAS TO DO
12 WITH THE FLASHPOINT IN THE MATERIAL. IN THE EARLY 90'S THERE
13 WAS THE RESERVATION -- I'M SORRY -- RESOURCES CONSERVATION
14 RECOVERY ACT WHICH IMPLEMENTED A LOT OF DEPARTMENT OF
15 TRANSPORTATION HANDLING REGULATIONS AND DOCUMENTATION
16 HANDLING -- DOCUMENTATION REGULATIONS ON THE TRANSPORTATION
17 AND DISPOSAL OF HAZARDOUS WASTE, AND SO THE 150 MATERIAL WAS
18 DEVELOPED AS A WAY TO RELIEVE CUSTOMERS OF THAT DOCUMENTATION
19 RESPONSIBILITY WHICH WAS FAIRLY ONEROUS.

20 BY ITS SPECIFICATION THE 150 MATERIAL CONTAINS LESS THAN
21 .5 -- ACTUALLY THE SPECIFICATION IS LESS THAN .4 PARTS PER
22 MILLION BENZENE, AND IT'S ALSO BECAUSE IT HAS A VERY HIGH
23 FLASHPOINT THAT IS DESIGNATION -- DESIGNATED AS NON-HAZ. AND
24 WE ARE GOING TO TALK ABOUT THAT A LITTLE MORE TODAY, BUT
25 THOSE POINTS ARE VERY IMPORTANT WHEN WE'RE THINKING ABOUT THE

1 HISTORY OF THE PARTS WASHER AND THE HISTORY OF SOLVENT AT THE
2 FACILITY.

3 YOUR HONOR, TO ADDRESS THE AFFIDAVITS, PUT VERY SIMPLY,
4 THEY'RE VERY CLEARLY UNTIMELY. THEY WERE PRODUCED IN THIS
5 CASE AFTER EXPERT DISCLOSURES WERE DUE, AFTER THE DISCOVERY
6 DEADLINE AND AFTER THE PRETRIAL DISCLOSURE DEADLINE IN THE
7 CASE. IT'S IMPORTANT TO NOTE THAT THEY ARE NOT SUPPLEMENTS
8 AS THAT TERM IS USED IN RULE 26. IF THEY WERE, EVEN IF THEY
9 WERE, THOSE MUST BE MADE BY THE PRETRIAL DISCLOSURE DEADLINE
10 IN RULE 26(E)(2).

11 IN THE CAMPBELL CASE THE FOURTH CIRCUIT ADDRESSES
12 WHETHER OR NOT A SUPPLEMENTAL REPORT WAS -- A LATE-FILED
13 SUPPLEMENTAL REPORT QUALIFIED AS A SUPPLEMENT UNDER 26 AND
14 SAID, NO, IT DIDN'T BECAUSE THE SUPPLEMENTAL REPORT DIDN'T
15 ADD NEW OR DIDN'T CORRECT INFORMATION. BECAUSE IT DIDN'T ADD
16 ANY NEW INFORMATION, BECAUSE IT DIDN'T CORRECT INFORMATION
17 THAT WAS ALREADY THERE, IT WASN'T A SUPPLEMENT AND IT WAS
18 OBVIOUSLY AN EFFORT TO RE-CAST THE EXPERT'S OPINION AND WAS
19 IMPROPER. THIS IS ALSO ADDRESSED IN THE EEOC DISTRICT COURT
20 OPINION THAT'S CITED IN OUR BRIEFING.

21 THERE THE DISTRICT OF MARYLAND SAYS THAT SUPPLEMENTATION
22 UNDER RULE 26 MEANS CONNECTING [SIC] INACCURACIES OR FILLING
23 THE INTERSTICES OF INCOMPLETE REPORTS BASED ON INFORMATION
24 NOT AVAILABLE AT THE TIME OF THE INITIAL DISCLOSURE. IN THAT
25 CASE A REPORT WAS FILED WITH AN OPPOSITION TO A MOTION TO

1 PRECLUDE UNDER DAUBERT AND 702 PRECISELY LIKE THE FACTS UNDER
2 OUR CASE.

3 THE COURT HELD THAT NEW REPORTS PROVIDED UNDER THE GUISE
4 OF SUPPLEMENTATION CANNOT BE PRODUCED TO ADDRESS CRITICISMS
5 THE DEFENDANTS RAISED IN THEIR MEMORANDUM IN SUPPORT OF THE
6 MOTION FOR SUMMARY JUDGMENT.

7 WE SEE THE SAME DYNAMIC PLAY OUT IN A NUMBER OF THE
8 CASES THAT ARE CITED IN OUR BRIEFING; PARTICULARLY THE
9 COCHRAN AND THE AVANCE CASES. REPORTS WHICH ARE SUBMITTED IN
10 OPPOSITION TO MOTIONS TO EXCLUDE EXPERTS UNDER RULE 702 AND
11 DAUBERT ARE HELD TO A VERY, VERY HIGH STANDARD, AND WHEN
12 THEY'RE NOT INTRODUCING NEW INFORMATION, THAT THEY ARE NOT
13 SUPPLEMENTS UNDER RULE 26. AND EVEN IF THEY ARE, COURTS
14 SCRUTINIZE THEM VERY, VERY CAREFULLY AS YOU KNOW, YOUR HONOR,
15 BECAUSE OF THE MANDATE OF RULE 37.

16 THE AFFIDAVITS HERE ARE NOT BASED ON ANY INFORMATION
17 THAT WAS NOT AVAILABLE AT THE TIME OF THE INITIAL REPORTS.
18 THE AFFIDAVITS EVEN SAY THAT THEY ARE RESPONDING TO
19 DEFENDANTS' DAUBERT CHALLENGES IN HARRISON PARAGRAPH FOUR AND
20 STEWART PARAGRAPH SIX. THESE AFFIDAVITS ARE CLEARLY A
21 RE-CASTING OF THEIR OPINIONS AND THAT WAS DEEMED IMPROPER BY
22 THE FOURTH CIRCUIT IN CAMPBELL.

23 IT'S SAFETY KLEEN'S POSITION THAT RULE 37 IS AN ABSOLUTE
24 BAR TO THE USE OF THESE AFFIDAVITS UNLESS PLAINTIFF CAN SHOW
25 THAT LATE PRODUCTION WAS SUBSTANTIALLY JUSTIFIED OR HARMLESS.

1 IN OTHER WORDS, YOUR HONOR, SUPPLEMENTATION, AS THAT TERM IS
2 DEFINED UNDER RULE 26, IS NOT A SIDE-ROUTE AROUND 37. RULE
3 37 IS AN ABSOLUTE BAR UNLESS THE PARTY CAN SHOW THAT THEY'RE
4 SUBSTANTIALLY JUSTIFIED OR THAT THEY ARE HARMLESS.

5 IN THIS CASE, YOUR HONOR, THEY ARE NOT SUBSTANTIALLY
6 JUSTIFIED BECAUSE THEY ARE NOT BASED ON ANY INFORMATION THAT
7 WAS UNAVAILABLE AT THE TIME OF THE INITIAL REPORTS. AND THEY
8 ARE NOT HARMLESS BECAUSE THERE'S NO OPPORTUNITY FOR OUR
9 CLIENT TO EVALUATE THOSE OPINIONS OR TO HAVE OUR EXPERTS
10 REBUT THEM AT THIS TIME.

11 *THE COURT:* I GUESS MY ISSUE -- EXCUSE ME FOR
12 INTERRUPTING -- WITH RULE 37 IS THAT THE LANGUAGE OF RULE 37
13 TO ME CONNOTES SOME WITHHOLDING OF INFORMATION THAT -- IT'S
14 SORT OF THE SAND-BAGGING IDEA, AND I DON'T THINK THAT WE --
15 WE HAVE A SAND-BAGGING SITUATION HERE. UNDER RULE 37 I THINK
16 C1 SAYS IF A PARTY FAILS TO PROVIDE INFORMATION OR IDENTIFY A
17 WITNESS, THEN THAT PARTY IS NOT ALLOWED TO USE THAT
18 INFORMATION OR WITNESS TO SUPPLY EVIDENCE DOWN THE ROAD
19 UNLESS THE FAILURE WAS SUBSTANTIALLY JUSTIFIED OR HARMLESS.

20 HERE I DON'T KNOW THAT THERE WAS A FAILURE TO PROVIDE
21 THE INFORMATION. I THINK THAT'S WHAT THE PLAINTIFF IS GOING
22 TO ARGUE, THAT THE INFORMATION WAS THERE, IT WAS IN THESE --
23 IN THESE DEPOSITIONS. BUT SO IT'S NOT SO MUCH A RULE 37
24 ISSUE BUT MORE OF A DEADLINE ISSUE I THINK. I DON'T KNOW,
25 BUT CONVINCE ME.

1 MR. ALOST: AND RESPECTFULLY, YOUR HONOR, I DON'T
2 WANT TO PARSE SEMANTICS AT ALL. MY READING OF RULE 37 AND MY
3 READING OF THE CASES THAT ARE CITED IN OUR BRIEF INTERPRETING
4 IT MAKES ME BELIEVE THAT WHAT RULE 37 IS SAYING IS THAT IF A
5 PARTY FAILS TO -- AND THE LANGUAGE IS: FAILS TO PROVIDE
6 INFORMATION OR IDENTIFY A WITNESS AS REQUIRED BY RULE 26(A)
7 OR E.

8 WELL, 26(A) AND E TALKS ABOUT EXPERT DISCLOSURES AND
9 EXPERT REPORTS. AND SO I READ RULE 37 TO SAY IF A PARTY
10 DOESN'T DO ITS JOB BY PRODUCING EXPERT REPORTS THAT LAY OUT
11 THE OPINIONS OF AN EXPERT AND THE FACTUAL BASES THAT SUPPORT
12 THOSE, THEN THE PARTY DOESN'T GET TO USE THESE OPINIONS
13 UNLESS THE PARTY CAN SHOW THAT THEIR FAILURE TO DO SO TIMELY
14 WAS SUBSTANTIALLY JUSTIFIED OR HARMLESS. THAT'S MY
15 INTERPRETATION OF RULE 37.

16 AND IT'S ALSO THE INTERPRETATION UNDER THE COCHRAN CASE
17 AND TO SOME EXTENT THE CAMPBELL CASE. IN THE CAMPBELL CASE
18 THE FOURTH CIRCUIT FOUND THAT THE SUPPLEMENTAL REPORT WAS NOT
19 SUBSTANTIALLY JUSTIFIED OR HARMLESS USING THE SOUTHERN STATES
20 FACTORS BECAUSE THERE WAS NO OPPORTUNITY TO DEPOSE THE
21 EXPERT, IT INHIBITED THE DEFENDANTS' ABILITY TO PREPARE FOR
22 TRIAL, UNNECESSARILY PROLONG LITIGATION, AND UNDERMINES
23 COURT'S MANAGEMENT OF THE CASE, SO...

24 THE COURT: I THINK THAT, THOUGH, PROCEDURAL
25 POSTURE-WISE THE CAMPBELL CASE IS HELPFUL. AND EEOC, THE

1 EEOC CASE, I THINK IT WAS -- IT'S VERY -- IT'S GOT GREAT
2 LANGUAGE FOR YOU, BUT I THINK THE CONTENT OF THAT EXPERT
3 REPORT WAS FUNDAMENTALLY DIFFERENT. THE COURT WAS CONCERNED
4 WITH I THINK THEY CALLED IT MIND-BOGGLING NUMBER OF ERRORS
5 THAT WERE IN THE REPORT, AND IT WASN'T SO MUCH THAT THE
6 NATURE OF THE REPORT WAS CHANGED IN RESPONSE TO SUMMARY
7 JUDGMENT LIKE I THINK THAT THE CAMPBELL COURT WAS CONCERNED
8 WITH.

9 WOULD YOU AGREE WITH THAT?

10 MR. ALOST: YOUR HONOR, LET ME GLANCE AT THE EEOC
11 OPINION QUICKLY TO MAKE SURE THAT I HAVE THE LANGUAGE
12 CORRECT. CERTAINLY IN THE EEOC CASE THEY WERE DEALING WITH A
13 VERY FACT-INTENSIVE REPORT WHICH THE COURT FELT WAS
14 INAPPROPRIATE UNDER A DAUBERT ANALYSIS BECAUSE OF THE ERRORS
15 IN THAT REPORT MADE IT UNRELIABLE.

16 THE COURT: BUT THAT'S NOT WHAT YOU ARE -- YOU
17 MEAN--

18 MR. ALOST: I AGREE, YOUR HONOR, BUT MY POINT WAS
19 THAT IN THE EEOC CASE, THE PARTY THAT EEOC PRODUCED WHAT IT
20 TITLED A SUPPLEMENTAL REPORT, AND IN THAT CASE THE DISTRICT
21 COURT SAID, YOU KNOW, THIS WAS ADDRESSED, THAT THE
22 SUPPLEMENTAL REPORT WAS DESIGNED AND CREATED TO ADDRESS
23 CRITICISMS THAT WERE RAISED IN THE BRIEFING.

24 FREEMAN, THE DEFENDANT IN THAT CASE, FILED MOTIONS TO
25 EXCLUDE THE INITIAL REPORT BECAUSE OF ITS INACCURACIES. AND

1 THE EEOC HAD THEIR EXPERT CREATE A SUPPLEMENTAL REPORT WHICH
2 STILL HAD ERRORS.

3 THE COURT: BUT WAS THE COURT'S FINDING THERE BASED
4 ON -- THE COURT'S DECISION TO EXCLUDE THE SUPPLEMENTAL
5 REPORT, WAS IT BASED ON THE ERRORS OR WAS IT BASED ON THE
6 LATENESS?

7 MR. ALOST: IT WAS BASED ON THE LATENESS, YOUR
8 HONOR, ON THE SUPPLEMENTAL REPORT, ON -- IN THE -- IT'S PAGE
9 797 THROUGH 798 OF THE OPINION THERE'S THAT EXACT DISCUSSION,
10 AND THE CONCLUSION IS THAT THE SUPPLEMENTAL REPORTS WERE
11 UNTIMELY AND WOULD NOT BE CONSIDERED.

12 THE COURT: OKAY.

13 MR. ALOST: AND THEY CONSIDERED THAT ANALYSIS UNDER
14 RULE 37.

15 THE COURT: OKAY.

16 MR. ALOST: BECAUSE IT FOUND THAT THE SUPPLEMENTAL
17 REPORTS WERE NOT SUBSTANTIALLY JUSTIFIED OR WERE HARMLESS.

18 THE COURT: YOU WOULD CONCEDE THAT THE COURT HAS
19 BROAD DISCRETION IN MAKING A DETERMINATION ABOUT --

20 MR. ALOST: ABSOLUTELY, YOUR HONOR.

21 THE COURT: -- WHETHER IT'S SUBSTANTIALLY JUSTIFIED
22 OR HARMLESS AND THEN--

23 MR. ALOST: YES, YOUR HONOR.

24 THE COURT: I THINK THAT YOUR BRIEF ADDRESSED THE
25 FACTORS THAT THE COURT IS TO CONSIDER IN DETERMINING WHETHER

1 THE LATE DISCLOSURES IS SUBSTANTIALLY JUSTIFIED OR HARMLESS.
2 I GUESS FOR YOU ALL, WHAT IS THE PRIMARY BASIS OF THAT
3 ANALYSIS? IS IT ON THE SURPRISE OR THE INABILITY TO CURE THE
4 SURPRISE OR IMPORTANCE OF THE EVIDENCE?

5 MR. ALOST: OUR POSITION IS CAUSED BY AN INABILITY
6 TO FLESH OUT AND OBTAIN DISCOVERY AND HAVE OUR EXPERTS
7 PROPERLY RESPOND TO WHAT ARE CLEARLY NEW OPINIONS. AND THE
8 PROBLEM WITH THE AFFIDAVITS IS THERE'S SOME BLENDING.
9 THERE'S SOME PARAGRAPHS IN THE AFFIDAVITS WHICH SEEM TO
10 REITERATE OR RE-HASH SOME OF THE LANGUAGE IN THERE AND THERE
11 ARE SEVERAL PARAGRAPHS AND SEVERAL PROVISIONS OF THE
12 AFFIDAVITS WHICH ARE CLEARLY NEW, THEY ARE A RE-PACKAGING,
13 THEY ARE A RE-CASTING, WHICH IS EXACTLY WHAT THE CASES THAT
14 LOOK AT THIS TYPE OF SUPPLEMENTATION OR DAUBERT CONTEXT SAY
15 YOU'RE NOT PERMITTED TO DO. YOU KNOW, THIS IS A PARTICULARLY
16 EGREGIOUS ABUSE OF THE RULES OF PROCEDURE WHEN YOU'RE TRYING
17 TO FIX THINGS IN LIGHT OF A DAUBERT CHALLENGE.

18 DID I ANSWER YOUR QUESTION, YOUR HONOR?

19 THE COURT: YES, SIR.

20 MR. ALOST: OKAY. OUR POSITION, FRANKLY, IS THAT
21 THESE LATE AFFIDAVITS THAT HAVE BEEN MADE IN RESPONSE TO THE
22 DAUBERT MOTIONS HAVE PLACED THE COURT AND THE DEFENDANTS IN A
23 POSITION OF HAVING TO DETERMINE WHAT IS AN IMPROPER
24 RE-CASTING AND WHAT IS A REGURGITATION OF TIMELY OPINIONS.

25 OUR POSITION IS THAT THE EASIEST AND CLEANEST WAY FOR

1 THIS COURT AND THE DISTRICT COURT TO ADDRESS THIS ISSUE IS TO
2 EXCLUDE THE AFFIDAVITS IN THEIR ENTIRETY AND TO CONSIDER THE
3 MERITS OF THE DAUBERT MOTIONS THAT ARE BEFORE THIS COURT BY
4 LOOKING TO THE TIMELY REPORTS AND THE DEPOSITION TESTIMONY OF
5 THESE GENTLEMEN BECAUSE BY LOOKING AT THE AFFIDAVITS AND THE
6 LANGUAGE IN THE AFFIDAVITS, IT IS PLACING THE COURT AND THE
7 PARTIES IN THE UNCOMFORTABLE POSITION OF OPENING PANDORA'S
8 BOX OF INTERPRETATION TRYING TO FIGURE OUT WHAT IS THE
9 MEANING HERE, WHAT -- IS THE EXPERT CHANGING HIS PHRASING, IS
10 HE CHANGING HIS THOUGHT PROCESS, IS HE CHANGING HIS OPINION,
11 AND IT BECOMES VERY DIFFICULT TO DO. AND IT'S PARTICULARLY
12 DIFFICULT TO DO WHEN THE AFFIDAVITS CONTAIN NO CITES TO THE
13 DEPOSITION TESTIMONY OR THE REPORTS OR THE UNDERLYING DATA.

14 AND SO OUR POSITION, YOUR HONOR, IS THAT THE AFFIDAVITS
15 SHOULD BE EXCLUDED IN THEIR ENTIRETY BECAUSE IT'S THE BEST
16 WAY TO PROTECT THE RECORD OF THE CASE.

17 THE COURT: OKAY. VERY GOOD. THANK YOU.

18 MR. ALOST: THANK YOU, YOUR HONOR.

19 THE COURT: MR. JENSEN?

20 MR. JENSEN: YES, YOUR HONOR. AND I HAVE A
21 POWERPOINT ABOUT THIS ISSUE, BUT I'M NOT AT ALL CONFIDENT I'M
22 ABLE TO GET IT. ACTUALLY CONNECTING WITH THE COURT'S SYSTEM,
23 BUT I'M GOING TO TRY ONE MORE TIME.

24 THE COURT: SURE.

25 MR. JENSEN: JUST NOT GETTING ANY SIGNAL FROM ME AT

1 ALL; ARE YOU? OKAY. WELL, I WILL DISPENSE WITH THAT, YOUR
2 HONOR.

3 THE COURT: DO YOU HAVE A PRINTOUT?

4 MR. JENSEN: I DO.

5 THE COURT: OR AN EXTRA ONE?

6 MR. JENSEN: I HAVE ONE COPY.

7 THE COURT: WE ARE HAPPY TO MAKE COPIES.

8 MR. JENSEN: AND YEAH, WHY DON'T I LOOK AT MY
9 COMPUTER SCREEN AND YOU CAN FOLLOW ALONG. I WOULDN'T HAVE A
10 COPY AVAILABLE FOR COUNSEL OR...

11 THE COURT: WELL, IT WON'T TAKE -- WE'VE GOT A
12 QUICK COPIER. WE WILL MAKE SEVERAL COPIES FOR COUNSEL.

13 MR. JENSEN: MY FAULT.

14 THE COURT: NO PROBLEM.

15 MR. JENSEN: WHEN I CAME BACK FROM THE VISIT, IT
16 WAS... I CLOSED THE COMPUTER AND I THINK IT DEFAULTS TO
17 DISPLAYING JUST MY SCREEN INSTEAD OF GOING THROUGH THE
18 PROJECTOR, AND I'M TRYING TO GET IT TO -- I THOUGHT I HAD
19 DONE THE SAME THING THAT I HAD JUST DONE, BUT I DON'T --
20 DOESN'T APPEAR TO WORK.

21 MR. MCGOLDRICK: JOHN, OUR TECHNICIAN, DOESN'T KNOW
22 MCINTOSH, SO...

23 MR. JENSEN: WELL, THANK YOU FOR OFFERING.

24 MR. TOLLISON: CAN WE TAKE A QUICK BREAK, YOUR
25 HONOR?

1 THE COURT: WHY DON'T WE TAKE A FIVE-MINUTE BREAK
2 AND LET YOU ALL KIND OF ADDRESS THIS. MAYBE WE CAN TAKE A
3 COMFORT BREAK FOR THE STAFF AS WELL, THEN WE WILL RE-GROUP.
4 AND MR. JENSEN, HOW LONG DO YOU THINK THAT YOUR ARGUMENT
5 MIGHT TAKE ON THIS ISSUE?

6 MR. JENSEN: ON THIS ISSUE? FIFTEEN MINUTES, YOUR
7 HONOR.

8 THE COURT: OKAY. AND THEN WE WILL HEAR A LITTLE
9 BIT ON REDIRECT. MY GOAL IS TO EXCUSE EVERYONE FOR LUNCH AT
10 AROUND NOON OR A FEW MINUTES AFTER, AND THEN WE CAN MAYBE
11 TAKE AN HOUR AND A HALF FOR LUNCH AND THEN COME BACK HERE
12 ABOUT 1:30 OR SO. BUT LET'S STAND DOWN FOR A FEW MINUTES AND
13 SEE IF WE CAN'T GET THE COMPUTER GOING. AND IF NOT, WE WILL
14 HAVE THE COPIES READY FOR YOU IN JUST A FEW MINUTES. ALL
15 RIGHT? WE WILL BE IN RECESS.

16 (WHEREUPON, A BRIEF RECESS WAS HELD.)

17 THE COURT: OKAY. WE ARE BACK ON THE RECORD. AND
18 MR. JENSEN, I THINK THAT IT APPEARS THAT THE COMPUTER IS
19 COOPERATING NOW?

20 MR. JENSEN: WELL, IT'S BECAUSE OF THE COOPERATION
21 OF DEFENSE COUNSEL, YOUR HONOR.

22 THE COURT: OH, I LIKE --

23 MR. JENSEN: THEIR COMPUTER--

24 THE COURT: WELL, THAT'S--

25 MR. JENSEN: THANK YOU.

1 THE COURT: I THINK THAT THAT'S WONDERFUL. WE
2 MIGHT SING KUMBAYA LATER. PLEASE PROCEED.

3 MR. JENSEN: OKAY. I WANT TO TAKE A LITTLE
4 DIFFERENT TACK, YOUR HONOR, IN ADDRESSING THIS ISSUE WITH
5 RESPECT TO THE AFFIDAVITS. AND I THINK THAT WHAT I'M ABOUT
6 TO SAY APPLIES EQUALLY TO BOTH DR. STEWART'S AFFIDAVIT AND
7 DR. HARRISON'S AFFIDAVIT, AND THAT IS THAT I THINK THAT --
8 NOT I THINK -- THESE AFFIDAVITS WERE BOTH FILED IN THE
9 CONTEXT OF A CHALLENGE UNDER RULE 702 TO ADMISSIBILITY AND
10 THIS COURT'S INQUIRY UNDER DAUBERT AND RULE 702 AS TO THE
11 RELIABILITY OF THE UNDERLYING METHODOLOGY THAT WAS USED BY
12 EACH OF THESE EXPERTS.

13 AND IN THAT CONTEXT, I WOULD SUBMIT TO THIS COURT, THE
14 INQUIRY AS TO WHAT IS PERMISSIBLY PART OF THE MATERIALS THAT
15 THIS COURT CAN AND SHOULD RELY UPON IN MAKING THE RELIABILITY
16 ASSESSMENT IS A QUITE DIFFERENT INQUIRY THAN WHAT IS
17 ULTIMATELY GOING TO BE ADMISSIBLE IN FRONT OF THE JURY AND --
18 AND IS ADMISSIBLE UNDER ALL OF OUR DISCOVERY RULES, AND SO...
19 AND I HAVE SPENT MY ENTIRE CAREER FOR 20-PLUS YEARS DOING
20 TOXIC TORT CASES FOR PLAINTIFFS. AND BECAUSE THAT'S THE PATH
21 THAT I HAVE CHOSEN, ROUTINELY IN ALMOST EVERY ONE OF MY CASES
22 I FACE, WHETHER I'M IN STATE COURT OR IN FEDERAL COURT, A
23 SIMILAR MOTION TO EXCLUDE THE TESTIMONY OF SOME OR ALL OF MY
24 EXPERT WITNESSES ON CAUSATION ON, YOU KNOW, ISSUES SIMILAR TO
25 THE ONES THAT HAVE BEEN RAISED HERE, SO I HAVE DONE THIS A

1 LOT. AND I HAVE DONE IT A LOT IN FEDERAL COURT. I HAVE DONE
2 IT A LOT IN STATE COURTS AROUND THE COUNTRY.

3 IT HAS ROUTINELY BEEN MY PRACTICE TO ASK EXPERTS TO
4 SUBMIT AFFIDAVITS AS PART OF THE DAUBERT RECORD FOR LACK OF A
5 BETTER WORD THAT ARE RESPONSIVE TO THE CRITIQUES TO THEIR
6 METHODOLOGY THAT, YOU KNOW, HAVE BEEN MADE IN THE CONTEXT OF
7 THE MOTIONS. AND FRANKLY, THIS IS THE FIRST TIME IN 20-PLUS
8 YEARS OF PRACTICE THAT I HAVE FACED A MOTION THAT IS
9 COMPARABLE TO THE MOTION THAT IS -- OR MOTIONS THAT ARE NOW
10 BEFORE THE COURT TO SAY, WELL, THESE ARE UNTIMELY OPINIONS
11 THAT WERE, YOU KNOW, NEW OPINIONS OR IMPROPER
12 SUPPLEMENTATION, OUTSIDE THE SCOPE OF THE CASE MANAGEMENT
13 ORDER AND THEREFORE SHOULD BE EXCLUDED BY THE COURT.

14 WELL, WHETHER OR NOT ANY OF THOSE OPINIONS IN THESE TWO
15 AFFIDAVITS ULTIMATELY SHOULD SEE THE LIGHT OF DAY IN FRONT OF
16 THE JURY, THOSE CONCERNS, ARGUMENTS, QUESTIONS I THINK WOULD
17 BE PROPERLY ADDRESSED IN THE CONTEXT OF THAT DISCUSSION. BUT
18 WHETHER OR NOT THIS COURT SHOULD IN THE CONTEXT OF ITS
19 RESPONSIBILITY UNDER RULE 702 TO ESSENTIALLY CHECK UNDER THE
20 HOOD OR TO USE A DIFFERENT METAPHOR, WITH THE COURT'S
21 INDULGENCE, YOU KNOW, THE JURY WITH RESPECT TO EXPERT
22 TESTIMONY IS GOING TO BE SERVED THE SAUSAGE OF THE EXPERT'S
23 OPINIONS AND CONCLUSIONS AND THEY ARE GOING TO GET A LIST OF
24 INGREDIENTS IN THE SAUSAGE IN BROAD FORM OF, YOU KNOW, HERE'S
25 WHAT I RELIED ON, HERE'S WHAT I RELIED ON AND HERE'S WHAT MY

1 REASONING WAS.

2 BUT THIS COURT'S RESPONSIBILITY UNDER RULE 702 IS TO ACT
3 MORE LIKE THE HEALTH INSPECTOR AND GO BEYOND THAT AND SAY,
4 OKAY, WELL, EXACTLY HOW DID THIS SAUSAGE REALLY GET MADE?
5 AND IN THE COURSE OF DOING THAT, I THINK THIS COURT HAS THE
6 RESPONSIBILITY UNDER DAUBERT AND RULE 702 TO LOOK AT THINGS
7 THAT THE JURY IS PROBABLY NOT GOING TO HEAR ABOUT AT ALL --
8 NOW, EXCEPT IN VERY BROAD STROKES.

9 AND SO, THESE ISSUES, YOU KNOW, THERE MAY BE SOME
10 SPECIFIC THINGS IN THE AFFIDAVITS THAT THEY ARE GOING TO
11 COMPLAIN ABOUT OR HAVE COMPLAINED ABOUT THAT WE WOULD WANT TO
12 PUT IT IN FRONT OF THE JURY. BUT I THINK THAT UNDER RULE
13 104(A), IN ADDRESSING THE PRELIMINARY QUESTION OF
14 ADMISSIBILITY, WHICH A DAUBERT QUESTION UNDER THE RULE 702 IS
15 SUCH A PRELIMINARY QUESTION, THIS COURT'S NOT BOUND BY THE
16 RULES OF EVIDENCE, AND IT IS ROUTINE, NOT JUST IN MY
17 PRACTICE, BUT IF YOU LOOK AT THE CASE LAW AROUND THE FEDERAL
18 COURT SYSTEM, IT IS ROUTINE FOR PARTIES TO SUBMIT IN
19 RESPONSE, DIRECT RESPONSE AND DIRECT REBUTTAL TO ARGUMENTS
20 MADE AND MOTIONS MADE TO STRIKE EXPERT TESTIMONY PURSUANT TO
21 DAUBERT FOR EXPERTS TO SUBMIT AFFIDAVITS THAT -- THAT PROVIDE
22 CLARIFYING SLASH SUPPLEMENTAL DISCUSSION OF THEIR METHODOLOGY
23 THAT ARE SPECIFICALLY ADDRESSING THE CRITIQUES THAT HAVE BEEN
24 OFFERED, AND THAT'S WHAT WE--

25 THE COURT: CLARIFYING OR SUPPLEMENTAL AFFIDAVITS.

1 BUT YOU DON'T MEAN TO ARGUE DIFFERENT OPINIONS IN THE
2 AFFIDAVIT IN RESPONSE TO SUMMARY JUDGMENT FROM THAT WHICH WAS
3 DISCLOSED WITHIN THE EXPERT REPORTS.

4 MR. JENSEN: I'M SORRY. WHAT'S THE COURT'S
5 QUESTION?

6 THE COURT: YOUR SUGGESTION IS THAT IT'S COMMON FOR
7 AND ROUTINE FOR PLAINTIFFS TO RESPOND THROUGH SUPPLEMENTAL
8 AFFIDAVITS IN RESPONSE TO SUMMARY JUDGMENT PROVIDING
9 CLARIFYING OR SUPPLEMENTAL ANALYSIS OR OPINION FROM THE
10 EXPERT.

11 BUT MY QUESTION IS, CAN THAT CLARIFYING OR SUPPLEMENTAL
12 INFORMATION ALSO BE DIFFERENT THAN THE OPINION THAT WAS
13 CONTAINED IN THE DISCLOSURES UNDER THE EXPERT?

14 MR. JENSEN: IN OTHER WORDS, YOU'RE SAYING IF
15 THE -- IF THE EXPERT HAS SUBSTANTIVELY CHANGED HIS OR HER
16 OPINION, CAN THEY DO THAT IN THE CONTEXT OF THIS AFFIDAVIT
17 THAT THEY HAVE SUBMITTED IN RESPONSE TO A DAUBERT MOTION.
18 AND I THINK THE ANSWER TO THAT IS MAYBE AND MAYBE NOT. I
19 THINK THAT THAT -- THAT PRESENTS A TOUGHER QUESTION TO THE
20 EXTENT THAT THAT IS WHAT HAS HAPPENED.

21 I DON'T THINK THAT'S A PROPER CHARACTERIZATION OF WHAT
22 HAS HAPPENED WITH RESPECT TO EITHER DR. STEWART OR DR.
23 HARRISON.

24 THE COURT: WELL, IF IT'S NOT CHANGING, THEN IF
25 THERE IS AN OPINION PROVIDED WHERE THERE WAS SILENCE BEFORE,

1 WOULD YOU CONCEDE THAT THAT IS DIFFERENT?

2 MR. JENSEN: WELL, YOU KNOW, IT'S ALL GOING TO BE
3 CONTEXT-DRIVEN, YOUR HONOR, AND THE DEVIL'S IN THE DETAILS,
4 BUT IN GENERAL MY ANSWER WOULD BE NO. I MEAN, WHAT THEY ARE
5 DOING HERE IS PROVIDING SOME DETAILED EXPLANATION AS TO
6 UNDERLYING THOUGHT PROCESSES, METHODS, DISCUSSIONS THAT GOES
7 BEYOND WHAT IS IN THEIR ALREADY FAIRLY -- NOT FAIRLY,
8 HIGHLY-DETAILED REPORTS AND SUPPLEMENTAL OR SUPPORTING
9 MATERIALS, AND THAT'S ROUTINE.

10 AND I THINK THAT IF YOU LOOK AT NOT JUST 104(A) BUT
11 IN -- AND I APOLOGIZE -- I HAVE THREE OR -- EXCUSE ME -- FOUR
12 CASES THAT I'D LIKE TO BRING TO THE COURT'S ATTENTION THAT
13 ARE NOT CITED IN OUR BRIEF, AND SO I KNOW THAT'S AN ISSUE OF
14 ITSELF, BUT I'D STILL LIKE TO ARGUE THEM. AND IF COUNSEL
15 WANTS TO ARGUE THAT THEY SHOULD NOT BE CONSIDERED, THEN THEY
16 CAN DO SO.

17 BUT THE FIRST IS A THIRD CIRCUIT DECISION IN A CASE
18 CALLED ODDI OR ODDI -- I DON'T KNOW HOW TO PRONOUNCE IT --
19 VERSUS FORD MOTOR FROM THE YEAR 2000. AND AS YOU CAN SEE ON
20 THE SCREEN, IN GENERAL IN DISCUSSING THE PROCEDURAL NECESSITY
21 OF WHAT SHOULD HAPPEN IN A DAUBERT HEARING, AND IN THAT CASE
22 SPECIFICALLY, YOUR HONOR, THERE WAS A QUESTION AS TO WHETHER
23 OR NOT THERE NEEDED TO BE A DAUBERT HEARING THAT INCLUDED
24 LIVE TESTIMONY FROM THE EXPERTS WHOSE OPINIONS WERE BEING
25 CHALLENGED. THE COURT ULTIMATELY CONCLUDED, WHICH IS

1 CERTAINLY THE MAJORITY VIEW, THAT THERE NEED NOT BE SUCH A
2 HEARING.

3 BUT THE COURT SAID THE PLAINTIFF NEEDS AN OPPORTUNITY TO
4 BE HEARD ON THE CRITICAL ISSUES OF SCIENTIFIC RELIABILITY AND
5 VALIDITY. THE OPPORTUNITY TO BE HEARD IS IMPORTANT BECAUSE
6 IT ALLOWS A PLAINTIFF A CHANCE TO HAVE HIS OR HER EXPERT
7 DEMONSTRATE AND EXPLAIN THE GOOD GROUNDS UPON WHICH THE
8 EXPERT EVIDENCE RESTS.

9 AND THEN IN THE OPINION THE COURT GOES ON TO CONCLUDE
10 THAT BECAUSE THE RECORD IN THAT PARTICULAR CASE INCLUDED
11 SUPPLEMENTAL DECLARATIONS OR AFFIDAVITS FROM THE EXPERTS
12 THAT, YOU KNOW, PURPORTED TO EXPLAIN THEIR GROUNDS FOR THEIR
13 OPINIONS, THAT THE DISTRICT COURT, YOU KNOW, HAD NOT ABUSED
14 ITS DISCRETION BY FAILING TO HOLD A TESTIMONY -- A HEARING
15 THAT INCLUDED LIVE TESTIMONY.

16 BUT, IF YOU LOOK AT THE OVERLYING OR THE OVERALL CONTEXT
17 OF THIS COURT'S ROLE AND RESPONSIBILITY UNDER DAUBERT,
18 CLEARLY YOU HAVE DISCRETION IN THAT ROLE TO BRING EXPERTS
19 HERE, TO REQUIRE THEM TO SHOW UP AND GIVE LIVE TESTIMONY.
20 AND I WOULD SUBMIT THAT THE KIND OF TESTIMONY THAT THEY WOULD
21 GIVE IF THEY WERE HERE WOULD BE IDENTICAL WITH OR QUITE
22 SIMILAR TO THE TESTIMONY THAT THEY HAVE GIVEN IN THE FORM OF
23 THE AFFIDAVITS THAT WE HAVE SUBMITTED. AND THE AFFIDAVIT
24 PROCESS IS A WAY OF SHORT-CUTTING THAT, YOU KNOW, AND DOING
25 AWAY WITH THE NEED FOR LIVE TESTIMONY, AND IN LIEU OF THAT,

1 YOU KNOW, ALLOWING AFFIDAVITS TO BE FILED THAT, YOU KNOW,
2 GIVE THE EXPERT THE OPPORTUNITY TO DEMONSTRATE AND EXPLAIN
3 THE GOOD GROUNDS UPON WHICH THEIR EVIDENCE RESTS.

4 AND IN THE FOUR CASES THAT I HAVE PUT UP OR GIVEN --
5 PROVIDED TO YOU THAT WERE NOT CITED ARE THAT ODDI CASE. THEN
6 THERE'S A CASE CALLED PRITCHARD VERSUS DOW AGRO SCIENCES, AND
7 THAT'S 263 FRD 277 FROM A WESTERN DISTRICT OF PENNSYLVANIA IN
8 2009. AND IN THAT CASE THERE WAS A SIMILAR MOTION TO STRIKE
9 A SUPPLEMENTAL DECLARATION SUBMITTED BY AN EXPERT IN RESPONSE
10 TO SUMMARY JUDGMENT AND DAUBERT MOTIONS TO EXCLUDE THEIR
11 OPINIONS, AND THE COURT DENIED THAT AND, YOU KNOW, SAID THAT
12 THE EXPERT SHOULD BE PERMITTED TO DO THAT IN THE CONTEXT OF
13 EXPLAINING THEMSELVES AND PROVIDING MATERIAL FOR THE COURT TO
14 CONSIDER UNDER RULE 104, RULE OF EVIDENCE 104, IN THE DAUBERT
15 INQUIRY.

16 SIMILARLY, THE SOUTHERN DISTRICT OF CALIFORNIA CASE, THE
17 350 WA LLC VERSUS CHUBB GROUP IS A SIMILAR DENIAL OF A MOTION
18 TO STRIKE AN EXPERT DECLARATION SUBMITTED IN RESPONSE TO A
19 DAUBERT MOTION. AND THEN FINALLY THE PUGH VERSUS LOUISVILLE
20 LADDER CASE IS A FOURTH CIRCUIT DECISION AND IT DOES NOT
21 ADDRESS DIRECTLY THE ISSUE OF WHETHER OR NOT SUCH
22 SUPPLEMENTAL DECLARATIONS OR CLARIFYING DECLARATIONS SHOULD
23 BE PERMITTED. BUT WHAT IT DOES DO IN A NOTE, NOTE THREE TO
24 THE COURT'S DECISION, IS POINT OUT THAT THE COURT DID HAVE
25 AVAILABLE TO IT AND CONSIDERED ON THE RECORD A SUPPLEMENT --

1 SUCH A SUPPLEMENTAL DECLARATION THAT HAD BEEN JOINTLY
2 SUBMITTED BY TWO OF THE PLAINTIFFS' EXPERTS WHOSE OPINIONS
3 WERE BEING CHALLENGED.

4 AND SO THAT'S JUST AN EXAMPLE OF A DECISION IN THIS
5 CIRCUIT WHERE A DISTRICT COURT HAD TAKEN THAT INTO ACCOUNT
6 AND THE FOURTH CIRCUIT POINTED IT OUT AS SOMETHING THAT, YOU
7 KNOW, WAS FURTHER BASES FOR THE DISTRICT COURT'S DECISION.

8 *THE COURT:* HOW DO WE SQUARE THAT WITH THE LANGUAGE
9 OF THE RULE ITSELF AND THE ADVISORY COMMITTEE NOTES TO RULE
10 26 THAT REQUIRE I THINK OR ADDRESS THE ISSUE THAT
11 MR. TOLLISON RAISED THAT WE HAD BACK IN THE 80'S WHERE YOU
12 JUST -- IT WAS GAMESMANSHIP OF PROVIDING MAYBE A VAGUE IDEA
13 OF WHAT THE OPINION WAS GOING TO BE AND THEN WHEN IT WAS
14 CHALLENGED, THEN THE OPINION WAS MODIFIED, AND IT SORT OF
15 WENT BACK AND FORTH.

16 AND I THINK THAT THE RULES NOW ARE INTENDED TO ESTABLISH
17 A DEADLINE BY WHICH THE DEFENDANTS ARE ENTITLED TO BE
18 PROVIDED THE COMPLETE STATEMENT OF ALL OPINIONS AND THE BASIS
19 FOR THE REASONS THEREFORE UNDER THE RULE. AND I THINK THE
20 ADVISORY COMMITTEE NOTES THEMSELVES SAY THAT THE EXPERT
21 REPORT IS INTENDED TO SET FORTH THE SUBSTANCE OF THE DIRECT
22 EXAMINATION OF THE EXPERT WITNESS MUST BE DETAILED AND
23 COMPLETE AND MUST STATE THE TESTIMONY THE WITNESS IS EXPECTED
24 TO PRESENT DURING DIRECT EXAMINATION TOGETHER WITH THE
25 REASONS THEREFORE.

1 SO, CAN YOU RECONCILE THE SERIES OF CASES THAT YOU HAVE
2 PRESENTED WITH THOSE ADVISORY COMMITTEE NOTES AND THE TEXT OF
3 THE RULE ITSELF?

4 MR. JENSEN: YES, YOUR HONOR, AND I WOULD DO THAT
5 BY GOING BACK TO WHAT I STATED WHEN I WAS STARTING OUT THIS
6 DISCUSSION WHICH IS THIS COURT'S INQUIRY UNDER RULE 702 INTO
7 RELIABILITY AND UNDER THE DAUBERT STANDARD IS A DIFFERENT --
8 IS GOING TO INVOLVE A LOT OF CONSIDERATION OF DETAILS,
9 FACT -- FACTUAL AND SCIENTIFIC DETAILS ABOUT METHODOLOGICAL
10 ISSUES THAT WHILE WILL BE TOUCHED UPON IN BROAD STROKES IN
11 FRONT OF THE JURY, THE NITTY GRITTY OF THOSE DETAILS IS
12 PROBABLY NOT EVER GOING TO BE HEARD BY THE JURY.

13 AND WHAT THAT BRINGS US TO IS -- IN THIS CONTEXT, THE
14 REPORT, ALTHOUGH HIGHLY-DETAILED AND LENGTHY REPORTS,
15 HIGHLY-DETAILED AND LENGTHY DOESN'T INCLUDE ALL OF THE
16 METHODOLOGICAL DETAIL THAT IS DESCRIBED AND LAID OUT MORE-SO
17 IN THE AFFIDAVITS.

18 THE QUESTION OF WHETHER THE AFFIDAVIT TESTIMONY AND
19 THOSE PORTIONS THAT ARE ARGUABLY NOT REFLECTED BY PRIOR
20 DEPOSITION OR REPORTS OF THOSE EXPERTS SHOULD GET IN FRONT OF
21 THE JURY I THINK IS WHAT RULE 26 AND EVERYTHING THAT -- ALL
22 THE LAW THAT SURROUNDS IT ADDRESSES. I DON'T THINK RULE 26
23 WAS INTENDED TO LIMIT THIS COURT'S -- THE SCOPE OF WHAT THIS
24 COURT SHOULD BE LOOKING AT IN THE CONTEXT OF A DAUBERT
25 INQUIRY. AND IF IT DID, THEN AGAIN THIS ROUTINE PRACTICE --

1 AND AGAIN, I -- I DO NOT BELIEVE THAT MY EXPERIENCE IS IN ANY
2 WAY UNIQUE OR IN ANY WAY NOT REFLECTED OF WHAT IS THE TYPICAL
3 EXPERIENCE ACROSS FEDERAL COURT PRACTICE, WHICH IS THESE
4 KINDS OF AFFIDAVITS ARE ROUTINELY CONSIDERED AND SUBMITTED IN
5 RESPONSE TO THESE, THESE MOTIONS.

6 AND AGAIN, WHETHER OR NOT THE STUFF THAT'S IN THOSE
7 AFFIDAVITS THAT'S NEW OR DIFFERENT OR IN ADDITION TO WHAT HAD
8 BEEN PREVIOUSLY IN THE REPORTS AND OR THE DEPOSITION
9 TESTIMONY SHOULD GET IN FRONT OF THE JURY, THAT'S FOR RULE
10 26. BUT FOR RULE 702 THIS COURT CAN AND SHOULD TAKE INTO
11 ACCOUNT THOSE AFFIDAVITS.

12 *THE COURT:* IT SEEMS LIKE IT'S -- THAT ARGUMENT
13 KIND OF DOES AN END-AROUND TO THE RULE 26 ISSUES. IT'S
14 BASICALLY, I THINK WHAT YOU'RE SAYING IS, ALL RIGHT, YOU
15 DON'T HAVE TO ADDRESS THE ADMISSIBILITY ISSUE OR THE
16 SUPPLEMENTATION ISSUE, BUT I'M GOING TO SHOW YOU THE DEFECTS
17 IN THE DEFENDANTS' ARGUMENTS IN CHALLENGING MY EXPERT, AND
18 THEN ONCE I CONVINCED YOU, WE CAN PRETEND THAT THAT NEVER
19 HAPPENED AND THAT WASN'T BEFORE THE COURT BECAUSE WE'LL BE
20 ABLE TO RELY ON THE LESS-SPECIFIC EXPERT OPINION THAT'S
21 BASICALLY DIRECTLY RELEVANT TO CAUSATION, BUT USE AS -- I
22 THINK THE COURT'S IMPRIMATUR TO SAY WE'RE OKAY WITH THE
23 SUFFICIENCY OF THIS EXPERT, AND I'M NOT SURE THAT'S WHAT THE
24 RULES INTENDED.

25 *MR. JENSEN:* WELL, I DON'T DISAGREE WITH YOUR

1 CHARACTERIZATION FACTUALLY OF WHAT'S HAPPENING. I DO
2 DISAGREE THAT THEIR CHARACTERIZATION OF LEGALLY THAT'S AN END
3 AROUND RULE 26 BECAUSE, AGAIN, I THINK RULE 26 IS INTENDED TO
4 AVOID SITUATIONS WHERE THE DEFENDANTS OR WHICHEVER PARTY IS
5 BEING PREJUDICED BY MODIFICATION OF OPINIONS THAT ARE GOING
6 TO ULTIMATELY SEE THE LIGHT OF THE DAY FOR -- IN FRONT OF THE
7 JURY AND NOT ABOUT, YOU KNOW, THIS COURT CAN AND SHOULD IN MY
8 VIEW TAKE INTO ACCOUNT LOTS OF HEARSAY MATERIALS AND OTHER
9 KINDS OF NITTY GRITTY, YOU KNOW, MATERIALS GET INTO THE HEART
10 OF PUBLISHED STUDIES, FOR EXAMPLE, THAT THE JURY MAY HEAR
11 SNIPPETS OF OR SUMMARIES OF, BUT THEY'RE CERTAINLY NOT GOING
12 TO GET ADMITTED IN EVIDENCE AND THEY ARE NOT GOING TO GO BACK
13 AT THE END OF THE DAY INTO THE JURY ROOM TO DELIBERATIONS AND
14 IF THEY ARE GOING TO BE PART OF THIS COURT'S RECORD AND A
15 CRITICAL PART OF THIS COURT'S RECORD FOR PURPOSES OF RULE
16 702.

17 AND SO I JUST THINK RULE 26 AND RULE 702 ARE LOOKING AT
18 DIFFERENT ISSUES, AND THAT'S THE WAY FEDERAL PRACTICE HAS
19 DEVELOPED IN THIS CONTEXT OF THESE DAUBERT INQUIRIES. I JUST
20 DON'T THINK THAT THERE IS AN INCONSISTENCY THERE. NOW AGAIN,
21 IF YOU GOT A CHANGE IN OPINION, IF YOU HAVE GOT THAT, YOU
22 KNOW, IS GOING TO GO IN FRONT OF THE JURY OR THE PLAINTIFF
23 WANTS IT TO GET IN FRONT OF THE JURY, THEN, YOU KNOW,
24 THOSE -- THOSE THINGS, THOSE RULE 26 ISSUES I THINK COME MORE
25 DIRECTLY IMPLICATED.

1 THE COURT: OKAY.

2 MR. JENSEN: AND THIS IS JUST, YOU KNOW, RULE 104
3 WHICH PROVIDES EXPLICITLY THE COURT IS NOT BOUND BY EVIDENCE
4 RULES EXCEPT THOSE ON PRIVILEGE.

5 AND YOU KNOW, AND BUT NOW GOING TO THE ISSUE THAT, THAT,
6 YOU KNOW, IS SET OUT IN OUR BRIEFS, WHEN YOU CUT TO THE CHASE
7 OF WHAT THE COMPLAINTS ARE ABOUT WHAT IS NEW OR DIFFERENT IN
8 THE AFFIDAVITS THAT HAVE BEEN PRESENTED HERE, THEY ARE NOT
9 REALLY NEW. THEY SEEK TO ELABORATE UPON -- ELABORATE UPON
10 AND EXPLAIN THE REPORTS OF THESE TWO EXPERTS, AND THAT'S THE
11 STANDARD THAT IS PERMISSIBLE AS ARTICULATED IN THIS MULDROW
12 CASE FROM THE DC CIRCUIT WHICH IS IN OUR BRIEF.

13 AND YOU KNOW, I DON'T THINK SAFETY KLEEN WENT IN DEPTH
14 AND MR. ALOST WENT INTO DEPTH WITH RESPECT TO THE SPECIFIC
15 PROBLEMS. HE JUST SAYS WE SHOULD -- YOU SHOULD STRIKE THE
16 AFFIDAVIT IN ITS ENTIRETY. WELL, THAT SEEMS BOTH TO BE
17 UNNECESSARY IN LIGHT OF ALTERNATIVES THAT THIS COURT
18 UNDERTAKE THAT ARE LESSER -- LESS DRAMATIC COURSES OF RELIEF
19 LIKE ALLOWING THEM TO TAKE ANOTHER DEPOSITION, FOR EXAMPLE.

20 THE COURT: I DON'T THINK THAT DOG IS GOING TO HUNT
21 WITH JUDGE LEWIS. I--

22 MR. JENSEN: THAT DOG IS NOT GOING TO HUNT WITH
23 RESPECT TO...

24 THE COURT: ADDITIONAL DISCOVERY. THAT'S JUST
25 MY -- THAT'S MY HUMBLE OPINION. I COULD BE WRONG, BUT I

1 THINK SHE'S READY TO TEE THIS UP FOR TRIAL.

2 MR. JENSEN: ALL RIGHT.

3 THE COURT: SO I DON'T REALLY SEE THAT AS A VIABLE
4 ALTERNATIVE IN LIGHT OF DISCOVERY HAVING CLOSED I THINK
5 DECEMBER OR SO. SO, I THINK THAT THAT, YOU KNOW, THEN THE
6 QUESTION BECOMES--

7 MR. JENSEN: HOW PREJUDICIAL IS IT.

8 THE COURT: WELL, HOW -- YOU DO THE WHOLE ANALYSIS.
9 I SUPPOSE THAT THERE'S SOMETHING THAT IS UNCOMFORTABLE IN THE
10 TIMING OF THESE OPINIONS. YOU KNOW, MY TIMELINE, AND I THINK
11 A LITTLE BIT CHRONOLOGICALLY I THINK THAT THE EXPERT REPORTS
12 WERE DUE AND SUBMITTED IN DECEMBER OF 2013, DOCTORS HARRISON
13 AND STEWART WERE DEPOSED MAY, JUNE, OCTOBER, EACH TWICE --
14 WHICH I THINK IS SIGNIFICANT, THAT THAT WAS A SIGNIFICANT
15 EXPENSE AND OPPORTUNITY THAT THEIR OPINIONS COULD BE VETTED
16 OUT AND THEN AFTER THE CLOSE OF DISCOVERY A FULL YEAR. SAY
17 DISCOVERY WAS DECEMBER OF 2014; RIGHT?

18 THEN AFTER THE PRETRIAL DISCLOSURES DEADLINE OF
19 FEBRUARY 1ST, THEN THE DAUBERT MOTIONS WERE FILED
20 FEBRUARY 13TH IDENTIFYING THE DEFICIENCIES OR THE ALLEGED
21 DEFICIENCIES IN THE EXPERT REPORTS. AND IT WAS -- REALLY IT
22 APPEARS ONLY IN RESPONSE TO THE MOTIONS FOR SUMMARY JUDGMENT
23 CHALLENGES THAT THE AFFIDAVIT, AFFIDAVITS, WERE PRODUCED AND
24 ADDRESSING I THINK SOME OF THE CHALLENGES THAT THE DEFENDANTS
25 PRESENTED. THAT MAKES ME FEEL UNCOMFORTABLE OR A LITTLE --

1 MR. JENSEN: WELL...

2 THE COURT: -- IT'S COINCIDENTAL.

3 MR. JENSEN: IT'S NOT COINCIDENTAL, YOUR HONOR.

4 IT'S NOT COINCIDENTAL. AS AN OFFICER OF THIS COURT I'M NOT
5 GOING TO TELL YOU THAT THOSE AFFIDAVITS WERE DONE FOR ANY
6 REASON OTHER THAN -- AND IN THE AFFIDAVITS THEMSELVES, AS
7 COUNSEL POINTED OUT, SAY THEY ARE IN RESPONSE TO --
8 SPECIFICALLY TO THE CHALLENGES TO THESE FOLKS' TESTIMONY.
9 I'M NOT TRYING TO HIDE THAT AT ALL.

10 THE COURT: WELL, AND I SUPPOSE THAT'S THE ISSUE
11 FOR ME IF THE -- IF REALLY THOSE OPINIONS WERE FORMULATED IN
12 THE AFFIDAVITS FOR THE PURPOSE OF THIS LITIGATION IN ORDER TO
13 AVOID SUMMARY JUDGMENT CHALLENGES, THEN THE QUESTION BECOMES
14 WHAT IS THE RELIABILITY OF THE OPINIONS WHEN IT IS FOR A
15 PARTICULAR LITIGATION AS OPPOSED TO, HEY, WE ARE GOING TO GET
16 THE BEST PERSON, THE EXPERT IN THE FIELD, AND I THINK THAT'S
17 HOW IT --

18 MR. JENSEN: OKAY. YOU--

19 THE COURT: -- THE RULES ARE SET UP TO INTEND TO
20 UTILIZE EXPERT WITNESSES IN ORDER TO EXPLAIN SCIENTIFIC OR
21 TECHNOLOGICAL OR PARTICULARIZED TESTIMONY THAT IS OUTSIDE OF
22 THE REACH OF LAY PEOPLE, NOT DESIGNED TO ALLOW PARTIES TO GET
23 THE HIRED GUN TO COME IN TO SAY WHATEVER THE PARTIES WANT,
24 AND SO THAT'S -- THAT'S WHERE THE ISSUE IS FOR ME.

25 MR. JENSEN: WELL, AND I APOLOGIZE, YOUR HONOR.

1 WHAT I WAS SAYING IS THAT THE EXISTENCE OF THE AFFIDAVITS,
2 THE PREPARATION OF THE AFFIDAVITS, WAS DIRECTLY IN RESPONSE
3 TO DAUBERT, AND NO DOUBT ABOUT THAT. THE OPINIONS REFLECTED
4 IN THOSE AFFIDAVITS ARE A EFFORT BY BOTH OF THESE TWO
5 WITNESSES TO DESCRIBE IN FURTHER DETAIL IN LIGHT OF THE
6 SPECIFIC CRITIQUES TO THEIR METHODOLOGIES THAT WERE DESCRIBED
7 AND ARTICULATED TO GIVE THIS COURT FURTHER INFORMATION ABOUT
8 THE METHODOLOGIES USED TO REACH THE CONCLUSIONS AND NOT TO
9 CHANGE THEIR OPINIONS AT ALL. OKAY.

10 SO THAT'S WHERE, YOU KNOW, TO DESCRIBE THOSE AFFIDAVITS
11 AS NEW OPINIONS REACHED TO KEEP THE PLAINTIFFS' CASE ALIVE I
12 THINK IS ENTIRELY UNFAIR. EVEN THOUGH I ACKNOWLEDGE FULLY
13 THAT THE AFFIDAVITS WERE PREPARED IN DIRECT RESPONSE TO THE
14 CRITIQUES UNDER DAUBERT AND THE MOTIONS FILED UNDER DAUBERT,
15 THEY WERE -- THEY WERE PREPARED SO THAT THIS COURT IN LIEU OF
16 LIVE EXPERT TESTIMONY AT A HEARING COULD SEE EXACTLY WHAT WAS
17 GOING ON UNDER THE HOOD SO TO SPEAK METHODOLOGICALLY WITH
18 RESPECT TO WHAT THESE EXPERTS DID IN REACHING THEIR OPINIONS
19 AND ADDRESSING IN SOME DETAIL THE CRITIQUES ABOUT ALL OF THE
20 ISSUES THAT ARE RAISED. AND THAT, AGAIN, PROCEDURALLY THAT
21 PRACTICE HAPPENS ALL THE TIME.

22 THE COURT: THAT DOESN'T MAKE IT RIGHT, YOU KNOW.
23 I THINK THAT THERE'S ALWAYS THIS ARGUMENT THAT, YOU KNOW,
24 THIS IS THE WAY WE DO IT IN THE OTHER COURTS OR THIS IS THE
25 WAY -- BUT IF YOU CAN -- WHAT I SWORE WAS TO UPHOLD MY --

1 UPHOLD THE LAW. I TOOK AN OATH TO DO THAT. AND THE CASE LAW
2 THAT I NEED TO RELY ON IS SUPREME COURT OR PUBLISHED FOURTH
3 CIRCUIT OPINION THAT CAN GUIDE ME ALONG WITH THE RULES AND
4 INTERPRETATION OF THE RULES.

5 AND SO, WHILE MANY COURTS IN CALIFORNIA MAY HAVE
6 ADDRESSED SOME ISSUES, WE IN THE FOURTH CIRCUIT ARE LOATHE TO
7 CITE THE NINTH CIRCUIT CASES. THAT'S JUST AS A PRACTICE.
8 AND SO, WE DON'T REALLY LOOK TO SEE WHAT EVERYBODY ELSE DOES,
9 BUT WE LOOK TO SEE WHAT DOES THE LAW PROVIDE AND WHAT DOES
10 THE LAW COMMAND, AND SO THERE ARE -- THAT'S WHERE MY
11 INTERESTS LIES IN SEEING WHAT THE RULE SAYS, SEEING IF IT'S
12 CLEAR, AND IF IT NEEDS INTERPRETATION, THEN GOING TO THE
13 BINDING AUTHORITY. AND IF THE BINDING AUTHORITY ISN'T THERE,
14 THEN TO CONSIDER ANY PERSUASIVE AUTHORITY THAT CAN BE MADE.
15 AND SO, THAT FOR ME IS THE CHALLENGE ON THIS CASE.

16 MR. JENSEN: WELL IF YOU LOOK, YOUR HONOR, AT THE
17 LAST CASE, THE 350 WA LLC CASE, AND THAT THE -- YES, THAT'S
18 A -- THE DISTRICT COURT IN CALIFORNIA, SO FALLS IN THE NINTH
19 CIRCUIT CATEGORY. BUT WHAT I WANT TO POINT YOU TO--

20 THE COURT: THEY DO GET IT RIGHT SOMETIMES.

21 MR. JENSEN: THERE'S QUOTES IN THAT CASE THAT I
22 WANT TO POINT YOU TO FROM BOTH THIRD CIRCUIT'S DECISION IN
23 ODDI AND THE SUPREME COURT'S DECISION IN KUMHO TIRE ABOUT
24 THIS CONSIDER -- WHAT THE COURT CAN AND SHOULD CONSIDER. AND
25 IF YOU LOOK AT THE BOTTOM OF PAGE 21 OF THE WESTLAW PRINTOUT

1 HERE. IF YOU'RE WITH ME, I THINK I TABBED IT FOR YOU.

2 *THE COURT:* YES, SIR.

3 *MR. JENSEN:* IF THE -- THE PARAGRAPH THAT STARTS
4 WITH STAR 30. THE LAST FULL SENTENCE OF THAT PARAGRAPH
5 BEGINS, IN DETERMINING WHETHER AN EXPERT'S PROPOSED TESTIMONY
6 IS RELEVANT AND RELIABLE, THE TRIAL COURT MAY CONSIDER OFFERS
7 OF PROOF, AFFIDAVITS, STIPULATIONS OR LEARNED TREATISES IN
8 ADDITION TO TESTIMONIAL OR OTHER DOCUMENTARY EVIDENCE AND OF
9 COURSE LEGAL ARGUMENT. AND THERE'S THE CITATION TO ODDI.

10 AND THEN IF YOU GO UP TO THE NEXT PAGE -- OR EXCUSE
11 ME -- THE NEXT COLUMN, THE TOP OF THE NEXT COLUMN IT SAYS,
12 THE DISTRICT COURT HAS BROAD AUTHORITY TO CONSIDER
13 DECLARATIONS AND OTHER DOCUMENTARY EVIDENCE IN ASSESSING THE
14 RELEVANCE AND RELIABILITY OF AN EXPERT'S PROPOSED TESTIMONY,
15 AND THEN THERE'S A CITATION TO THE SUPREME COURT'S DECISION
16 IN KUMHO TIRE.

17 AND SO, YOU KNOW, I DON'T THINK THAT THIS IS -- THIS
18 PROCEDURE THAT I'M -- I HAVE USED HERE, THAT THE PLAINTIFF
19 HAS USED TO SUPPLEMENT THE DISCUSSION OF THE METHODOLOGIES
20 APPLIED BY THE EXPERTS WITH A AFFIDAVIT SUBMITTED DIRECTLY IN
21 RESPONSE TO A MOTION IS SOMETHING THAT IS -- IS EITHER NEW TO
22 THE FEDERAL COURTS OR, YOU KNOW, IT'S -- IT'S BEEN EXPRESSLY
23 CONTEMPLATED AND APPROVED BY OUR SUPREME COURT.

24 AND SO, AND IF AGAIN IF THIS COURT HAD EXERCISED ITS
25 DISCRETION TO ASK DR. STEWART AND DR. HARRISON TO BE HERE, I

1 KNOW WE WOULD BE PUTTING ON A DIRECT EXAMINATION THAT, YOU
2 KNOW, SAID THE SAME THINGS THAT ARE IN THOSE AFFIDAVITS. SO,
3 IF THE COURT HAS DISCRETION TO HEAR THAT AND CONSIDER THAT,
4 WHY ARE THESE AFFIDAVITS OUT OF BOUNDS?

5 THE COURT: BECAUSE I THINK THAT THE OPPORTUNITY
6 FOR CROSS-EXAMINATION IS LOST. SO, HERE WHEN YOU PROVIDE AN
7 AFFIDAVIT, THEN YOU HOLD THE CARDS AND YOU HOLD ALL THE
8 QUESTIONS AND ALL THE ANSWERS IN YOUR HAND. AND WHEN THE
9 WITNESS IS ON THE STAND, THEY ARE SUBJECTED TO
10 CROSS-EXAMINATION IN DETAIL AND THERE'S AN OPPORTUNITY TO
11 HAVE THEM CLARIFY AND TO BACK-TRACK AND TO REVISE.

12 THAT IS A MORE ROBUST ENVIRONMENT FOR PROVIDING EVIDENCE
13 OR TESTIMONY OR ARGUMENT THAN IN DRAFTING AN AFFIDAVIT OR
14 HAVING COUNSEL DRAFT AN AFFIDAVIT AND HAVE THEM SIGN, YOU
15 KNOW, AND SO THAT'S THE DIFFERENCE. I MEAN, I THINK THERE'S
16 A SIGNIFICANT DIFFERENCE--

17 MR. JENSEN: WELL, I DON'T DISAGREE WITH ANYTHING
18 YOU JUST SAID EXCEPT FOR THE LEGAL IMPACT OF THAT IF THE
19 COURTS -- FEDERAL COURTS -- BROADLY WERE TO TAKE THE POSITION
20 THAT THE DEFENDANTS ARE TAKING HERE WOULD MEAN THAT IF THE
21 PLAINTIFFS WANTED IT OR THE -- FRANKLY IF EITHER SIDE WANTED
22 IT, THAT IT WOULD BE -- IT WOULD FOLLOW FROM WHAT THE COURT
23 JUST SAID; THAT LIVE TESTIMONY NEEDS TO HAPPEN IN THIS
24 CONTEXT.

25 THE COURT: I DON'T KNOW THAT THAT'S THE NECESSARY

1 COROLLARY. I THINK THE TAKE-HOME LESSON IS TO PROVIDE A FULL
2 AND COMPLETE EXPERT OPINION THAT DOES NOT REQUIRE
3 SUPPLEMENTATION OR DOES NOT REQUIRE SO MUCH SUPPLEMENTATION
4 TO CREATE SOME QUESTIONS OF INCONSISTENCY DOWN THE ROAD.
5 HAVING SAID THAT, I'M NOT -- I'M NOT MAKING A DECISION ON
6 THAT ISSUE.

7 I THINK THAT THE REAL RUBBER IS GOING TO HIT THE ROAD ON
8 THE SUBSTANTIVE DAUBERT MOTIONS THIS AFTERNOON AND TOMORROW
9 WHERE WE CAN SEE WHETHER IT REALLY EVEN MAKES A DIFFERENCE,
10 YOU KNOW, THE NEW OPINIONS, IF THEY ARE NEW, OR THE
11 CLARIFICATION OF THE METHODOLOGY, WHETHER THAT HAS AN IMPACT
12 ON THE DAUBERT ANALYSIS.

13 MR. JENSEN: WELL, YOUR HONOR, IN THE CONTEXT OF
14 CASES LIKE ODDI IN THE THIRD CIRCUIT WHERE ONE PARTY IS
15 SAYING THE DISTRICT COURT SHOULD HAVE HAD A HEARING WHERE
16 THERE WAS LIVE TESTIMONY AND THE ULTIMATE RESOLUTION OF THAT
17 BY THE COURT OF APPEALS IS TO SAY, NO, THAT WASN'T NECESSARY
18 FOR THE COURT TO DO, AND ONE OF THE PRIMARY REASONS WHY IT
19 WAS NOT NECESSARY WAS THE COURT HAD BENEFIT OF THE SAME TYPE
20 OF, YOU KNOW, WHETHER YOU WANT TO CALL THEM SUPPLEMENTAL OR
21 REBUTTAL AFFIDAVITS OR WHATEVER YOU WANT TO CALL THEM, THE
22 SAME TYPE OF AFFIDAVITS OR DECLARATIONS THAT HAVE BEEN
23 SUBMITTED IN THIS CASE I THINK DOES SUGGEST THAT, YOU KNOW,
24 THIS ISSUE ABOUT BEING TIED UP WITH THE REQUIREMENTS OF RULE
25 26 AND THE EFFECTS OF THAT UNDER RULE 37 IN THE CONTEXT OF

1 THE RULE 702 INQUIRY ARE NOT APPROPRIATE.

2 THE COURT: OKAY. VERY GOOD. DID YOU GET THROUGH
3 YOUR POWERPOINT OR IS THERE MORE TO SAY HERE?

4 MR. JENSEN: WELL, I WOULD JUST SAY AND WITH
5 RESPECT TO THIS SLIDE, YOUR HONOR, YOU KNOW, THIS -- THE
6 SPECIFIC COMPLAINTS ABOUT WHAT IS NEW IS NOT REALLY NEW. NOW
7 AGAIN, THERE'S FAR MORE DETAIL THAN THERE WAS, BUT DR.
8 STEWART'S REPORT DISCUSSES SPECIFICALLY AND EXPRESSLY THE
9 SHEEHAN ARTICLE THAT DESCRIBES MUCH OF THE TESTING DATA THAT
10 WAS THE TESTING DONE FOR BENZENE BY SAFETY KLEEN, THE
11 AFFIDAVIT PROVIDES DETAILED REASONS THAT ARE NOT IN THE
12 REPORT ABOUT WHY DR. STEWART DID NOT INCORPORATE ALL OF THAT
13 TESTING DATA INTO HIS MODELING, BUT IT WAS CLEAR FROM THE
14 OUTSET THAT HE DID NOT DO THAT, THAT HE HAD CHOSEN NOT TO DO
15 THAT.

16 HIS DEPOSITION GOES INTO SOME DETAIL ABOUT, I WOULD NEED
17 X, Y AND Z BEFORE I WOULD BE ABLE TO DO THAT AND I DON'T HAVE
18 THAT INFORMATION WITH RESPECT TO THE TESTING THAT YOU HAVE
19 PROVIDED AND THAT YOU CONDUCTED.

20 AND FURTHERMORE, ON THE SPECIFIC ISSUE OF A PRIMARY
21 PROBLEM THAT'S LAID OUT IN DETAIL IN THE AFFIDAVIT, WHICH IS
22 BECAUSE SAFETY KLEEN'S TESTING OF ITS SOLVENTS FOR BENZENE
23 CONTENT WAS DONE THROUGH THE USE OF COMPOSITE SAMPLING THAT
24 RESULTED IN VOLATILIZATION OF BENZENE, AND THEREFORE, YOU
25 KNOW, BY THE TIME THE ACTUAL TEST GETS CONDUCTED, THE

1 MATERIAL -- THE AMOUNT OF BENZENE THAT'S LEFT IN THAT
2 MATERIAL IS NOT REPRESENTATIVE OF WHAT WAS ORIGINALLY IN THE
3 MATERIAL. WHILE THAT ISSUE WAS NOT LAID OUT IN DETAIL IN THE
4 DEPOSITION OF DR. STEWART, HE DID DISCUSS THE FACT THAT IN
5 FACT IT WAS COMPOSITE SAMPLING.

6 SO, AND GENERALLY SAID THAT THERE WAS LACK OF QUALITY
7 CONTROL INFORMATION AVAILABLE TO HIM REGARDING SAFETY KLEEN'S
8 BENZENE TESTING DATA. SO ALL OF THAT WAS NOT NEW OPINIONS,
9 BUT AGAIN, AS JUST FURTHER EXPLANATION OF THE OPINIONS HE
10 HAD.

11 MOVING ON, THAT AGAIN THERE'S A DIFFERENCE BETWEEN
12 PROVIDING FURTHER FACTUAL SUPPORT FOR THE OPINIONS AND
13 PROVIDING A DIFFERENT OPINION. AND THAT'S WHAT PARAGRAPHS 48
14 AND 49 DO OF DR. STEWART'S AFFIDAVIT. AND SIMILARLY, THE
15 COMPARISON OF HIS MODELING RESULTS TO THE AIRBORNE EXPOSURES
16 MEASURED AND RECORDED IN A PUBLISHED ARTICLE AND IN THE 1990
17 NATLSCO STUDY THAT WAS PRODUCED BY SAFETY KLEEN WERE NOT A
18 CHANGE OF HIS OPINIONS BUT JUST REINFORCE WHAT HE HAD ALREADY
19 EXPRESSED.

20 I DON'T KNOW IF YOU WANT ME TO TALK ABOUT DR. HARRISON'S
21 AFFIDAVIT WITH RESPECT TO THAT BUT, YOU KNOW, SIMILARLY
22 THERE'S REALLY NOTHING NEW IN DR. HARRISON'S AFFIDAVIT THAT
23 HAD NOT BEEN PREVIOUSLY DESCRIBED.

24 THE COURT: ALL RIGHT. VERY GOOD. ANYTHING
25 FURTHER, MR. JENSEN, ON THIS ISSUE?

1 ANY REPLY?

2 MR. ALOST: YOUR HONOR, EXTREMELY BRIEFLY, I WANT
3 TO KEEP THIS ON TRACK TODAY AND I KNOW YOU DO AS WELL. IN
4 ITS MOST SIMPLISTIC FASHION TO ME, RULE 26 SAYS WHAT SHOULD
5 BE DISCLOSED AND WHEN. RULE 37 SAYS WHAT HAPPENS WHEN YOU
6 DON'T. RULE 37 IS THE TEETH BEHIND RULE 26. AND RULE 37
7 SAYS IF YOU DON'T PRODUCE TIMELY BY RULE 26(A) OR E, THE
8 PARTY WHO FAILS TO DISCLOSE IS NOT ALLOWED TO USE THAT
9 INFORMATION OR WITNESS TO SUPPLY EVIDENCE ON A MOTION AT A
10 HEARING OR AT TRIAL.

11 I CAN'T WRAP MY BRAIN AROUND THE IDEA OF SOMETIMES IT'S
12 OKAY AND SOMETIMES IT'S NOT. TO ME RULE 37 IS EVIDENT. IF A
13 DISCLOSURE ISN'T TIMELY AND IF THERE'S NOT A SHOWING OF
14 SUBSTANTIAL JUSTIFICATION OR HARMLESSNESS, THAT OPINION OR
15 THAT NEW INFORMATION OR THAT NEW DISCLOSURE IS OUT FOR ALL
16 PURPOSES.

17 ALSO, YOUR HONOR, I -- I HAVE BEEN HANDED THESE CASES
18 JUST A FEW SECONDS AGO. I DON'T WANT TO GET DOWN IN THE
19 WEEDS ON THEM. WHAT I WOULD SAY IS THAT OF THE ODDI AND PUGH
20 CASES THAT COUNSEL JUST REFERRED TO FOR THE FIRST TIME TODAY,
21 I DON'T FIND ANY DISCUSSION OF TIMELINESS. I JUST COULDN'T
22 FIND A DISCUSSION OF USING AFFIDAVITS IN LIEU OF LIVE
23 TESTIMONY.

24 IN THE PRITCHARD CASE THERE WAS AN OBJECTION AS TO
25 TIMELINESS AND APPARENTLY THE COURT EVALUATED THE NEW

1 OPINIONS OR THE CHALLENGED OPINIONS IN A SUPPLEMENTAL REPORT,
2 AND ON -- I'M LOOKING FOR A PAGE NUMBER, YOUR HONOR -- ON
3 PAGE 287 OF THE OPINION SAID, AFTER CONSIDERING THE
4 SUBMISSIONS, IT'S CLEAR THAT DR. OMALU'S STATEMENT IN THE
5 CHALLENGED DECLARATION ARE CONSISTENT WITH THE OPINIONS SET
6 FORTH IN HIS EXPERT REPORT AND DURING HIS DEPOSITION.

7 SO WHETHER WE QUIBBLE WITH IT OR NOT, AT LEAST IN THAT
8 CASE THE AFFIDAVIT WAS EVALUATED FOR TIMELINESS AND THE COURT
9 DETERMINED THAT IT WAS CONSISTENT WITH PRIOR OPINIONS.

10 AS FOR THE 350 WA LLC OPINION, YOUR HONOR, I CAN'T
11 SQUARE THAT FINDING AND THAT RESULT WITH THE SOUTHERN STATES
12 CASE, WITH CAMPBELL, OR WITH THE OTHER CASES THAT WE HAVE
13 CITED AND TALKED ABOUT TODAY FROM THE DISTRICT COURTS IN THE
14 FOURTH CIRCUIT.

15 YOUR HONOR, UNLESS YOU HAVE ANY QUESTIONS, I'M GOING TO
16 STOP TALKING.

17 THE COURT: VERY GOOD. THANK YOU.

18 MR. ALOST: THANK YOU, YOUR HONOR.

19 THE COURT: WE'RE A LITTLE BEHIND SCHEDULE. I
20 APOLOGIZE FOR THAT. BUT --

21 MR. JENSEN: MY FAULT.

22 THE COURT: -- NO, NO, NOT AT ALL. BUT I THINK
23 THAT WE STILL CAN -- CAN GET A LOT DONE TODAY. SO, IT'S
24 ABOUT 12:30, 12:33. SO, WHY DON'T WE TAKE -- IS AN
25 HOUR-AND-A-HALF BREAK OKAY WITH EVERYONE? GIVE YOU

1 SUFFICIENT TIME TO GO AND GET SOMETHING TO EAT AND COME BACK?

2 MR. TOLLISON: IT'S UP TO YOU, YOUR HONOR.

3 MR. JECKEL: THAT'S FINE.

4 MR. ALOST: CERTAINLY, YOUR HONOR.

5 THE COURT: OKAY. LET'S GO DO THAT. AND SO, LET'S
6 TRY TO BE BACK HERE AT 2:00. THAT GIVES EVERYBODY AN HOUR
7 AND A HALF. AND SO, LET'S GET READY BACK TO GO AT 2:00 AND
8 WE'LL PROBABLY GO UNTIL ABOUT 3:30 OR SO TO TAKE A BREAK AND
9 TRY TO WRAP UP BY 5:30 SO WE CAN LET THE STAFF GO. OKAY?
10 ALL RIGHT.

11 MR. TOLLISON: WE ARE OKAY TO LEAVE EVERYTHING
12 HERE, YOUR HONOR; RIGHT?

13 THE COURT: YES. WE WILL LOCK THE COURTROOM SO
14 EVERYTHING IS SECURE.

15 MR. TOLLISON: THANK YOU.

16 THE COURT: OKAY? THANK YOU.

17 (WHEREUPON, COURT WAS IN RECESS FOR LUNCH.)

18 THE COURT: ALL RIGHT. WE ARE BACK ON THE RECORD
19 IN THIS CASE. DID EVERYONE HAVE A GOOD LUNCH? GOOD. GOOD.
20 THE COURTROOM DEPUTY MARY TELLS ME THAT Y'ALL MIGHT BE
21 WANTING TO SWITCH AROUND FOR ARGUMENTS?

22 MR. MCGOLDRICK: YES, YOUR HONOR, JUST BECAUSE
23 THERE'S NO MONITOR AND THAT'S WHERE I WAS SITTING, SO I WAS
24 JUST GOING--

25 THE COURT: OH, I SEE. YOU HAVE SWITCHED ALREADY.

1 OKAY.

2 MR. MCGOLDRICK: IS THAT ALL RIGHT?

3 THE COURT: I'M GOOD. LET ME JUST GET SETTLED HERE
4 AND THEN... I WAS AFRAID YOU WERE GOING TO SAY YOU SWITCHED
5 THE MOTIONS THAT WE ARE GOING TO ARGUE AND I WAS GOING TO
6 HAVE TO GO LUG ANOTHER SET OF -- BUT YOU WERE JUST TALKING
7 ABOUT IN THE COURTROOM, SO VERY GOOD. VERY GOOD.

8 SO I BELIEVE THAT WE ARE GOING TO TAKE UP DR. HARRISON'S
9 MOTION, SET OF MOTIONS TO EXCLUDE THE OPINION OF DR.
10 HARRISON; IS THAT CORRECT?

11 MR. MCGOLDRICK: YES, YOUR HONOR, THAT'S CORRECT.

12 THE COURT: OKAY. VERY GOOD. SO, THERE ARE A
13 COUPLE OF DIFFERENT SETS OF MOTIONS AND I'M GOING TO LET YOU
14 ALL DECIDE AND TELL ME WHO IS GOING TO ARGUE ON THE BASIS OF
15 WHICH MOTION.

16 MR. MCGOLDRICK: THANK YOU, YOUR HONOR. JAMES
17 MCGOLDRICK ON BEHALF OF SAFETY KLEEN. BECAUSE WE ARE THE
18 ONLY PARTY THAT FILED A MOTION BASED ON GENERAL CAUSATION AND
19 GENERAL CAUSATIONS, THE QUESTION ANSWER BEFORE YOU GET TO THE
20 SPECIFIC WORK, WE ARE GOING TO GO FIRST IF THAT'S ALL RIGHT.

21 THE COURT: ALL RIGHT. VERY WELL.

22 MR. MCGOLDRICK: YOUR HONOR, BENZENE IS FOUND
23 EVERYWHERE. THE COURT'S AWARE OF THAT AT THIS POINT. BUT
24 IT'S AN IMPORTANT CONCEPT GIVEN HARRISON'S METHODOLOGIES AND
25 SOME OF HIS VIEWS SUCH AS NO SAFE THRESHOLD. THERE'S BENZENE

1 IN AUTOMOBILE EXHAUST. THAT'S PROBABLY THE BIGGEST
2 CONTRIBUTOR ALONG WITH FOREST FIRES TO WHY WE ARE BREATHING
3 IT RIGHT NOW IN AMBIENT AIR. GASOLINE HAS BENZENE. DRINKING
4 WATER, FOODS. JUST ABOUT EVERY COMMON HOUSEHOLD PRODUCT
5 THAT'S PETROLEUM-DERIVED INCLUDING VASELINE, SCENTED CANDLES
6 AND SUCH.

7 BENZENE ITSELF IS A COLORLESS LIQUID WITH A SWEET ODOR.
8 IT'S MADE BOTH FROM NATURAL PROCESSES AND HUMAN ACTIVITY, AND
9 AGAIN IT'S IN ALL KINDS OF THINGS FROM CRUDE OIL TO PENS,
10 TAPES, TOBACCO SMOKE, ET CETERA, AND OF COURSE IT'S ALSO IN
11 MINERAL SPIRITS.

12 CAN YOU ACTUALLY GO TO STEWART SLIDE THREE AND FOUR,
13 PLEASE? THREE FIRST, PLEASE. THANKS. THREE. THANKS.
14 BEFORE WE GET INTO BENZENE CONTENT IN TERMS OF PARTS PER
15 MILLION, I THINK IT'S IMPORTANT JUST TO BRIEFLY GO OVER WHAT
16 A PART PER MILLION IS. IT REFERS TO TINY, TINY AMOUNTS THAT
17 ARE REALLY HARD TO EXPRESS AS A PERCENTAGE BECAUSE YOU HAVE A
18 LOT OF LEADING ZEROS. AND BY WAY OF EXAMPLE, 1 PERCENT IS
19 10,000 PARTS PER MILLION. GASOLINE, FOR EXAMPLE, IF IT'S
20 THREE OR 4 PERCENT IS 30 TO 40,000 PARTS PER MILLION.
21 .1 PERCENT IS A THOUSAND.

22 NEXT SLIDE. THANK YOU. TO PUT THAT IN CONTEXT, ONE
23 PART PER MILLION WOULD BE THE EQUIVALENT OF ONE PERSON IN
24 OVER 12 WILLIAMS BRICE STADIUMS.

25 THE COURT: OKAY. NOW, I CAN UNDERSTAND THAT

1 BECAUSE I HAVE BEEN THERE A LOT, SO OKAY. VERY GOOD.

2 MR. TOLLISON: WHEN IT'S FILLED I PRESUME.

3 THE COURT: THAT'S ALMOST ANY HOME GAME.

4 MR. MCGOLDRICK: THE LAST ONE ON STEWART. THE NEXT
5 SLIDE. THE NEXT SLIDE ON STEWART. AND YOUR HONOR, JUST
6 TO -- BY WAY OF BACKGROUND AND VERY, VERY BRIEFLY, THIS IS A
7 CUT-A-WAY PICTURE OF A SAFETY KLEEN PARTS WASHER. SO IMAGINE
8 IT'S SLICED DOWN THE MIDDLE AND YOU'RE LOOKING AT IT FROM THE
9 FRONT. YOU'VE GOT A SINK ON A DRUM, YOU HAVE GOT A FLEXIBLE
10 HOSE THAT'S A LOW-FLOW HOSE SO THE SOLVENT IS PUMPED FROM THE
11 CONTAINER IN THE BOTTOM AT -- THROUGH THE LOW-FLOW HOSE INTO
12 A DRAIN OR A SINK THAT HAS A DRAIN IN IT. THE SOLVENT NEVER
13 FILLS UP. IT'S GOT A FILTER IN IT. THE SOLVENT DRAINS
14 DOWN -- BACK DOWN TO THE BOTTOM AND IT RECIRCULATES.

15 WHENEVER THE CUSTOMER HAS DECIDED THAT IT NEEDS SERVICE
16 REPLACEMENT, USUALLY IT'S ON AN EIGHT-WEEK OR SOMETIMES IT'S
17 A 12-WEEK SCHEDULE, ONE OF OUR SERVICE REPS WILL GO OUT, PICK
18 UP THE DIRTY SOLVENT, REPLACE IT WITH FRESHLY-RECYCLED
19 SOLVENT OR VIRGIN SOLVENT AND TAKE OFF WITH THE USED MINERAL
20 SPIRITS WHICH IS THEN RECYCLED.

21 WE HAVE SEVERAL TYPES OF MINERAL SPIRITS. AND THE TWO
22 AT ISSUE IN THIS CASE ARE SAFETY KLEEN 105 MINERAL SPIRITS
23 AND SAFETY KLEEN 150. YOU HEARD MR. ALOST TALK ABOUT 150 A
24 LITTLE BIT EARLIER. IT'S TYPICALLY .4 PARTS PER MILLION OR
25 LESS. ALL RIGHT. IF YOU COULD GO BACK TO SLIDE NUMBER

1 THREE.

2 THE COURT: CAN I YOU ASK ABOUT THE FLASHPOINT? I
3 UNDERSTAND THERE'S A DIFFERENT FLASHPOINT. COULD YOU EXPLAIN
4 THAT TO ME A LITTLE BIT MORE?

5 MR. MCGOLDRICK: YES, YOUR HONOR. THE WAY SAFETY
6 KLEEN FIRST CAME ABOUT WAS BACK IN THE OLD DAYS PEOPLE USED
7 TO USE GASOLINE IN A BUCKET TO WASH PARTS. AND THE NUMBER
8 ONE HAZARD WAS FIRE. AND SO, IN ORDER TO GET AWAY FROM THAT,
9 THE GENTLEMAN, BEN PALMER, WHO INVENTED THE PARTS WASHER
10 CREATED A SINK ON A DRUM, HAS A FUSIBLE LID. SO IF THERE'S
11 FIRE, THAT LID SLAMS SHUT, AND HE DESIGNED IT TO USE
12 SOMETHING OTHER THAN GASOLINE.

13 GASOLINE HAS A LOW FLASHPOINT WHICH MEANS IT CATCHES
14 FIRE VERY EASILY. 105 ORIGINALLY GOT ITS NAME BECAUSE IT HAD
15 A 105-DEGREE FLASHPOINT, ALTHOUGH IT'S ACTUALLY HIGHER THAN
16 THAT. I CAN GO INTO DETAILS ON THAT. 150 HAS A AT LEAST
17 150-DEGREE FLASHPOINT.

18 THE COURT: VERY GOOD.

19 MR. MCGOLDRICK: IN TERMS OF THE BENZENE CONTENT OF
20 DIFFERENT SUBSTANCES, WHEN YOU HEAR OR READ DR. HARRISON
21 TALKING ABOUT BENZENE OR YOU SEE STUDIES ABOUT BENZENE IN
22 NHL, I MEAN, THAT INCLUDES PURE BENZENE. PURE BENZENE HAS
23 OBVIOUSLY A MILLION PARTS PER MILLION. GASOLINE
24 HISTORICALLY, YOU KNOW, TODAY IT'S PROBABLY CLOSER TO
25 1 PERCENT, BUT HISTORICALLY IT'S AS HIGH AS 4.9 PERCENT. SO

1 YOU HAVE A RANGE THERE, BUT IT'S A LOT; 10,000 TO 49,000
2 PARTS PER MILLION CERTAINLY AS COMPARED TO THE MINERAL
3 SPIRITS SOLVENT.

4 TYPICALLY -- WELL, ACTUALLY WITH ALL THESE SOLVENTS, YOU
5 KNOW, VARIOUS SOLVENTS PRIOR TO AND SOME SOLVENTS AFTER, WHAT
6 THAT REFERS TO IS OVER TIME THE BENZENE CONTENT IN THESE
7 SOLVENTS HAS GONE DOWN. AND THAT'S PRETTY MUCH ACROSS THE
8 BOARD OF VARIOUS PRODUCTS.

9 SAFETY KLEEN 105. THAT, FOR PURPOSES OF THIS CASE, THE
10 ACTUAL TESTING DATA IN THIS CASE FOR THE ACTUAL RELEVANT TIME
11 PERIODS RANGED BETWEEN 11 PARTS PER MILLION AND 36-AND-A-HALF
12 PARTS PER MILLION. AGAIN, I CAN -- YOU SEE THE PERCENTAGE
13 EQUIVALENTS RIGHT THERE.

14 SAFETY KLEEN 150, AGAIN, IS LESS THAN TYPICALLY .4 PARTS
15 PER MILLION OR DOWN AS LITTLE AS .1 PART PER MILLION. IF YOU
16 LOOK AT THAT SLIDE, THE DIFFERENCE BETWEEN GASOLINE AND ITS
17 BENZENE CONTENT VERSUS 105 AND THE DIFFERENCE BETWEEN SAFETY
18 KLEEN 105 AND PAN-FRIED BEEF IS FAIRLY STRIKING. PAN-FRIED
19 BEEF HAS FOUR TIMES MORE BENZENE IN IT THAN 150 SOLVENT. BY
20 COMPARISON, SIMILARLY 105 SOLVENT HAS ABOUT 50 TIMES MORE
21 BENZENE IN IT THAN PAN-FRIED BEEF.

22 SO THE DIFFERENCE BETWEEN OUR SOLVENT AND SOME OF THESE
23 FOOD ITEMS IS MUCH SMALLER THAN THE DIFFERENCE BETWEEN
24 GASOLINE AND OUR PRODUCT.

25 DOSE RESPONSE IS AN IMPORTANT CONCEPT ESPECIALLY IN THIS

1 CASE. DR. HARRISON BELIEVES, FOR EXAMPLE, THAT THERE IS NO
2 SAFE THRESHOLD; ANY AMOUNT IS ENOUGH. WELL, THE SINGLE MOST
3 IMPORTANT CONCEPT IN TOXICOLOGY IS DOSE RESPONSE. EVERYTHING
4 IN TOO HIGH OF A QUANTITY IS TOXIC. EVEN WATER. AND BY THE
5 SAME TOKEN, SUBSTANCES THAT AREN'T TOXIC OR EVEN
6 CARCINOGENIC, IF THEY ARE NOT ABSORBED OR YOU DON'T HAVE AN
7 EXPOSURE THAT'S HIGH ENOUGH, IT'S STILL SAFE, IT'S STILL
8 DOSE-RESPONSE NO MATTER WHAT YOU'RE TALKING ABOUT.

9 NEXT SLIDE. NOW MINERAL SPIRITS HAVE BEEN AROUND
10 FOREVER, DECADES. MILLIONS OF WORKERS WORK WITH THEM.
11 THERE'S NO EPIDEMIC OF CANCER LET ALONE NHL. IN FACT,
12 MINERAL SPIRITS HAVE BEEN USED SO WIDELY FOR SO LONG THAT
13 SCIENTIFIC AGENCIES LIKE IARC, ATSDR, NIOSH, ET CETERA
14 SPECIFICALLY STUDIED MINERAL SPIRITS JUST LIKE THEY DID
15 GASOLINE.

16 AND ACCORDING TO ACGIH, MILLIONS OF WORKERS HAVE BEEN
17 EXPOSED TO STODDARD SOLVENT WITH MINIMAL EFFECTS, AND YOU CAN
18 SEE THAT ON A DAILY BASIS ABOUT 75,000 WORKERS USE MINERAL
19 SPIRITS. MINERAL SPIRITS IS A CATEGORY OF DIFFERENT TYPES OF
20 MINERAL SPIRITS. TYPICALLY THEY'VE ALL CONTAINED LESS THAN A
21 THOUSAND PARTS PER MILLION. SAFETY KLEEN'S MINERAL SPIRITS
22 SOLVENTS HAVE QUITE A BIT LESS THAN THAT AS THE COURT HAS
23 SEEN.

24 IN TERMS OF DAUBERT AND THE COURT'S ROLE AS A
25 GATEKEEPER, THERE ARE ADDITIONAL CONSIDERATIONS THAT ARE IN

1 THE CASE LAW OTHER THAN THE STANDARD ONES THAT YOU SEE. AND
2 IN TERMS OF WHETHER OR NOT THE OPINION WAS DEVELOPED
3 EXPRESSLY FOR LITIGATION, AS A SIDE-NOTE IN THIS CASE, DR.
4 HARRISON FIRST FORMED HIS OPINION THAT BENZENE CAUSES NHL
5 WHEN A PLAINTIFF'S LAWYER ASKED HIM TO DO IT IN A CASE
6 CALLED -- IT WAS AN IBM LITIGATION CASE. THAT CASE WAS FILED
7 IN 2001. IT CONCLUDED IN 2004. SO SOMETIME IN THERE, DR.
8 HARRISON FIRST FORMED THE OPINION THAT BENZENE CAUSES NHL.
9 AND SEVERAL YEARS AFTER THAT HE AUTHORED THE GARCIA
10 DECLARATION FROM ANOTHER CASE WE WILL TALK ABOUT LATER.

11 ANOTHER FACTOR THAT DAUBERT'S PROGENY LOOKS AT IS
12 WHETHER OR NOT THE EXPERT EMPLOYED THE ANTITHESIS OF THE
13 SCIENTIFIC METHOD. AND THAT'S A LOT OF WHAT WE WERE TALKING
14 ABOUT EARLIER TODAY. YOU COME UP WITH YOUR OPINIONS, YOU GET
15 CHALLENGED ON THEM AND THEN YOU DO YOUR HOMEWORK LATER.

16 IN TERMS OF WHETHER OR NOT AN EXPERT HAS ADEQUATELY
17 ACCOUNTED FOR ALTERNATE EXPLANATIONS, THAT'S AN IMPORTANT
18 DAUBERT CONSIDERATION AND CERTAINLY AN IMPORTANT
19 CONSIDERATION IN THIS CASE BECAUSE THERE ARE MANY THINGS DR.
20 HARRISON HASN'T RULED OUT AND HE ADMITS THAT. HE JUST RULES
21 EVERYTHING IN. AND SOME OF THE THINGS HE'S UNABLE TO RULE
22 OUT ARE SOLE CAUSES.

23 AND IMPORTANTLY, THE CASE LAW TALKS ABOUT EPIDEMIOLOGY
24 AS BEING THE GOLD STANDARD. AND I KNOW PLAINTIFFS' COUNSEL
25 CITED SOME CASES, AND WE WILL TALK ABOUT THOSE, TO SUGGEST

1 THAT YOU DON'T NEED EPIDEMIOLOGY, YOU DON'T HAVE TO LOOK AT
2 IT. WELL, THAT'S NOT TRUE. THE CASE LAW IS CONSISTENT AND
3 IT'S CLEAR. IF IT EXISTS, YOU'VE GOT TO LOOK AT IT. YOU'VE
4 GOT TO ACCOUNT FOR IT. YOU CAN'T JUST IGNORE IT.

5 CERTAIN SITUATIONS WHERE IT DOESN'T EXIST AND THERE'S
6 OTHER FACTORS -- AND WE WILL TALK ABOUT THAT IN CONNECTION
7 WITH BENEDI AND WESTBERRY. THAT'S A DIFFERENT SCENARIO AND
8 WE WILL TALK ABOUT THAT LATER.

9 THIS IS JUST BASICALLY OUR THREE POINTS. WE ARE
10 CONTENDING HARRISON'S GENERAL CAUSATION OPINION IS
11 UNRELIABLE, HIS SPECIFIC CAUSATION OPINION IS UNRELIABLE, AND
12 HE ALSO RELIES ON STEWART WHOM WE ALSO BELIEVE IS UNRELIABLE
13 AND SHOULD BE STRICKEN.

14 GENERAL CAUSATION. YOUR HONOR IS ALREADY FAMILIAR WITH
15 WHAT THAT IS. BUT LOOKING AT THE CASE LAW AS WELL, IT'S NOT
16 ONLY -- IT'S THE SPECIFIED SUBSTANCE. IT'S NOT WHAT HARRISON
17 IS DOING IN TERMS OF LOOKING AT BENZENE AS A COMPONENT. YOU
18 HAVE GOT TO LOOK AT THE SPECIFIC SUBSTANCE. AND IN THIS CASE
19 DR. HARRISON FOCUSED ON THE WRONG SUBSTANCE. HE LOOKED ONLY
20 AT WHETHER OR NOT BENZENE CAN CAUSE NHL. HE DID NOT EVEN
21 LOOK AT THE ISSUE OF WHETHER OR NOT MINERAL SPIRITS CAN, AND
22 THAT'S WHAT WE PROVIDE IN THIS CASE OR PROVIDED IN THIS CASE.
23 NEXT SLIDE.

24 THE COURT: WELL, IS THAT A DISTINCTION WITHOUT A
25 DIFFERENCE IN THE SENSE THAT THE MINERAL SPIRITS ANALYSIS

1 WOULD HAVE TO INCLUDE THE BENZENE EXPOSURE OR CAUSATION? I
2 MEAN, THERE'S NO SUGGESTION THAT THERE'S ANY OTHER COMPONENT
3 OF MINERAL SPIRITS THAT WOULD CAUSE THE HODGKIN'S,
4 NON-HODGKIN'S LYMPHOMA; IS THERE?

5 MR. MCGOLDRICK: YES, YOUR HONOR. I UNDERSTAND
6 YOUR QUESTION. ACTUALLY THERE IS. FOR EXAMPLE, IARC. TAKE
7 IARC. THEY'VE CONCLUDED THAT BENZENE CAUSES AML. THAT'S THE
8 ONE DISEASE WE ALL AGREE ON. IN FACT, WE WILL TALK ABOUT
9 THIS FIRST CASE HERE IN A MOMENT INVOLVED AML.

10 IN THOSE CASES YOU NEVER DISPUTE GENERAL CAUSATION WHEN
11 IT COMES TO BENZENE AND AML. BUT IARC HAS LOOKED AT, FOR
12 EXAMPLE, MINERAL SPIRITS AND FOUND THAT THERE IS NO EVIDENCE
13 THAT MINERAL SPIRITS CAUSE ANY CANCER INCLUDING AML. SAME
14 THING WITH GASOLINE. SO THEY DO BELIEVE THAT THE BEN -- YOU
15 HAVE TO PROVE AND LOOK AT LITERATURE THAT EXAMINES BENZENE AS
16 A COMPONENT OF THAT SUBSTANCE BECAUSE BENZENE IN A MIXTURE
17 WITH OTHER CHEMICAL CONSTITUENTS ACTS DIFFERENTLY.

18 THE COURT: SO DOES IT HAVE A STABILIZING FORCE?
19 IS IT -- IS THE COMPOUND OF BENZENE MORE STABLE WHEN IT'S IN
20 MINERAL SPIRITS AS OPPOSED TO BEING IN ANOTHER FORM?

21 MR. MCGOLDRICK: THAT'S AN EXCELLENT QUESTION. IF
22 WE HAD THIS GLASS OF WATER HERE AND WE SPIKED IT WITH SOME
23 PURE BENZENE AND GOT IT TO LET'S SAY A HUNDRED PARTS PER
24 MILLION AND THEN I HAD MINERAL SPIRITS, LET'S SAY IT HAD A
25 HUNDRED PARTS PER MILLION AS WELL. WELL, THE BENZENE TENDS

1 TO WANT TO STAY IN SUBSTANCES THAT ARE SIMILAR.

2 SO, MINERAL SPIRITS HAVE OTHER CHEMICAL CONSTITUENTS
3 FROM THE CHAIN, THE --

4 THE COURT: RIGHT.

5 MR. MCGOLDRICK: -- DERIVED CHAIN THAT ARE LIKE IT,
6 AND SO BENZENE IS LESS LIKELY TO LEAVE A SOLVENT BECAUSE IT'S
7 REALLY VOLATILE. BUT IN WATER OR SOMETHING THAT IT'S VERY
8 DIFFERENT FROM, IT TENDS TO WANT TO ESCAPE MORE QUICKLY.

9 THE COURT: RIGHT.

10 MR. MCGOLDRICK: AND THEN THERE'S OTHER ASPECTS OF
11 WHAT BENZENE IS IN A MIXTURE WITH. FOR EXAMPLE, SOME
12 CHEMICAL CONSTITUENTS OUTCOMPETE BENZENE IN TERMS OF BEING
13 METABOLIZED. SO, IF IT'S IN A MIXTURE WITH LET'S SAY TOLUENE
14 AND XYLENE, IT MIGHT BE OUTCOMPETED BY THOSE AS OPPOSED TO
15 WHETHER OR NOT IT WAS IN WATER, FOR EXAMPLE.

16 THE COURT: OKAY. SO THE VOLATILITY ARGUMENT,
17 THOUGH, AS REFERENCED EARLIER ABOUT TESTING THE CONCENTRATION
18 OF BENZENE AT A SPECIFIC POINT IN TIME AS OPPOSED TO THE
19 EVAPORATION OR THE -- NOT REALLY EVAPORATION, BUT THE
20 LESS-CONCENTRATED AMOUNT, DOES THAT HAVE TO DO -- COULD THAT
21 ANALYSIS CHANGE DEPENDING ON THE SOLUTION IN WHICH THE
22 BENZENE WERE LOCATED?

23 MR. MCGOLDRICK: EARLIER COUNSEL WAS REFERRING TO
24 A -- JUST A BASELESS STATEMENT FROM DR. STEWART. HE DIDN'T
25 CITE ANYTHING. HE JUST MADE THAT COMMENT THAT HE THINKS WHEN

1 THE VIALS ARE COLLECTED, IF THERE'S A TINY LITTLE BIT OF
2 HEAD-SPACE THAT SOMEHOW THE BENZENE ESCAPES AND IT
3 VOLATILIZES OUT. THAT'S A DIFFERENT SITUATION BECAUSE IT'S
4 CONTAINED.

5 AND BY THE WAY, IT'S IN A MINERAL SPIRIT, SO IT'S IN
6 THERE LIKE CONSTITUENTS. BUT IN TERMS OF WHY IT'S IMPORTANT
7 IN THIS CASE, IT'S VERY, VERY IMPORTANT BECAUSE THE DATA IS
8 PRETTY CLEAR IF I DROP OFF OR WE DROP OFF A DRUM OF SOLVENT
9 AT A PLACE OF EMPLOYMENT AND AN INDIVIDUAL STARTS WORKING
10 WITH IT, LET'S JUST SAY ONE INDIVIDUAL TO START WITH, AFTER
11 FIVE HOURS OF USE HALF THE BENZENE IS GONE.

12 AND IMAGINE IF YOU'RE ON AN EIGHT-WEEK SERVICE PERIOD.
13 I MEAN, I DROP OFF A DRUM, SERVICE -- I'M A SERVICE REP. I
14 LEAVE. PLAINTIFF STARTS WORKING WITH IT. LET'S SAY HE DOES
15 30 MINUTES A DAY, JUST THAT PLAINTIFF. YOU KNOW, BY MIDDLE
16 OF THE NEXT WEEK ALL THE BENZENE IS GONE OR MOST OF IT'S GONE
17 AND YOU HAVE ANOTHER SEVEN WEEKS IN THE SERVICE PERIOD WITH
18 NO BENZENE.

19 THE COURT: WELL, IS THAT BECAUSE OF THE
20 INTRODUCTION OF OXYGEN INTO THE FLOW OF BENZENE? IS IT JUST
21 BEING AERATED OR IS IT--

22 MR. MCGOLDRICK: BENZENE IS VOLATILE, WANT TO
23 ESCAPE. AND WHEN YOU'RE CLEANING, YOU KNOW, WE HAVE A LOW
24 FLOW HOSE TO KEEP DOWN, YOU KNOW, VAPORS AND SUCH, BUT IT
25 JUST COMES OUT OF THE PARTS WASHER. IF YOU HAVE TWO PEOPLE

1 WORKING ON IT, IT COMES OUT TWICE AS FAST ASSUMING THEY ARE
2 WORKING WITH IT THE SAME AMOUNT OF TIME.

3 SO THAT CONCEPT IS IMPORTANT ALSO WITH RESPECT TO
4 STEWART. I MEAN, WE ARE NOT ARGUING HIM RIGHT NOW, BUT WHEN
5 HE ASSUMES LET'S SAY SOLVENT GOES ON ITS SKIN OR THE PERSON'S
6 SKIN, HE ASSUMES THAT BENZENE REMAINS CONSTANT FOR EITHER THE
7 ENTIRE TIME OR A LONG PERIOD OF TIME. HE DOESN'T ACCOUNT FOR
8 IT RAPIDLY EVAPORATING, VOLATILIZING.

9 THE COURT: RIGHT. NOW, DOES THE -- IS THE
10 BENZENE'S MOLECULAR WEIGHT HEAVIER SUCH THAT WHERE IT SITS IN
11 THE DRUM MAY BE AFFECTED BY THE LENGTH OF TIME THAT THE DRUM
12 STAYS THERE?

13 MR. MCGOLDRICK: IT'S AN EXCELLENT QUESTION. IN
14 TERMS OF LET'S SAY THE SINK, WE SAW THE CUT-A-WAY. THE
15 BENZENE VAPOR -- WELL, THE MINERAL SPIRITS VAPORS THAT
16 CONTAIN TINY AMOUNTS OF BENZENE ARE HEAVIER THAN AIR AND THEY
17 TEND TO STAY LOW IN THE SINK. SO, YEAH, THOSE VAPORS ARE
18 TYPICALLY HEAVIER THAN AIR. AND THAT'S WHY THE SINK IS
19 DESIGNED WITH CERTAIN DEPTH. BUT I'M NOT SURE IF THAT
20 ANSWERS...

21 THE COURT: WELL, I GUESS THE DRUM, GOING BACK TO
22 THE PICTURE, IS THE DRUM AT THE BOTTOM AND THEN THE HOSE
23 SUCKS FROM THE TOP OR THE BOTTOM OF THAT DRUM OR DOES THE
24 DEVICE THAT'S UP THE TOP HAVE A HOSE THAT COMES OUT FROM THE
25 BOTTOM?

1 MR. MCGOLDRICK: THERE'S A PUMP AT THE BOTTOM --

2 THE COURT: OKAY.

3 MR. MCGOLDRICK: -- THAT WHEN YOU TURN ON THE PUMP
4 THE SAFETY KLEEN PARTS WASHER OR ANY PARTS WASHER, THE PUMP,
5 CIRCULATING PUMP DOWN HERE AT THE BOTTOM -- I DON'T KNOW IF I
6 CAN... DOWN HERE IS WHAT PUMPS IT UP INTO THE LOW FLOW HOSE,
7 IT COMES OUT, AND THEN IT DRAINS BACK DOWN TO THE SINK. IT
8 NEVER BUILDS UP IN THE SINK IN HERE. CERTAINLY THERE'S NO
9 EVIDENCE THAT ANYONE MISUSED THIS PARTS WASHER AND BLOCKED IT
10 UP. BUT THAT'S HOW IT WORKS. AND THEN THE DRUM IS NOT FULL
11 UP TO THE TOP. USUALLY IT'S RIGHT ABOUT HERE.

12 SO -- AND THIS WILL BE MORE IMPORTANT WHEN YOU SEE
13 STEWART, BUT IT'S AN IMPORTANT CONCEPT. FOR EXAMPLE, SOME
14 STUDIES INVOLVE VATS OF SOLVENT. SO IF YOU'RE STANDING IN
15 FRONT OF AN OPEN VAT WITH A LARGE SURFACE AREA OF SOLVENT,
16 THE EXPOSURE IS -- I MEAN, IT'S BASIC 101 IH, INDUSTRIAL
17 HYGIENE --

18 THE COURT: SURE.

19 MR. MCGOLDRICK: -- YOU'RE GOING TO HAVE MORE
20 EXPOSURE. HERE YOU NEVER GET A BUILD-UP OF SOLVENT. IT'S A
21 LOW FLOW HOSE AND YOU'RE SEPARATING THE USER FROM THE SOLVENT
22 IN TERMS OF, YOU KNOW, KEEPING IT IN THE DRUM.

23 THE COURT: OKAY. SO, THE FLOW FROM THE DRUM
24 THROUGH THE CIRCULATING PUMP, DOES THE PUMP HAVE CIRCULATION
25 WITHIN THE DRUM OR CIRCULATION JUST FROM SOME POINT IN THE

1 DRUM UP TO THE HOSE? I GUESS IF YOU THINK ABOUT IT LIKE IF I
2 HAVE A -- IF I MIX SOME KOOL-AID OR SOMETHING AND THEN THE
3 KOOL-AID GETS DARKER AT THE BOTTOM IF I LET IT SIT FOR A
4 WHILE IF IT SETTLES, AND IF I HAVE A STRAW THAT DRINKS FROM
5 THE BOTTOM AS OPPOSED TO DRINKING FROM THE TOP, WILL IT BE --
6 THE BENZENE IN THERE, THE KOOL-AID, WILL IT SETTLE OR DOES
7 THE PUMP ACT TO REDISTRIBUTE AND MAKE MORE UNIFORM THE
8 CONTENTS OF THE DRUM?

9 MR. MCGOLDRICK: I UNDERSTAND YOUR QUESTION NOW.
10 YEAH. NO, THE -- IT'S NOT AS THOUGH ANY CONSTITUENT
11 INCLUDING THE TINY AMOUNTS OF BENZENE SETTLE TO THE BOTTOM.
12 THEY, YOU KNOW--

13 THE COURT: OR FLOAT TO THE TOP. THEY ARE JUST
14 THROUGHOUT.

15 MR. MCGOLDRICK: EXACTLY. NOW, THE ONLY THINGS
16 THAT MIGHT -- IF THERE'S BEEN, YOU KNOW, GRIT OR WHATEVER
17 THAT MANAGED TO MAKE IT THROUGH, YOU WILL SEE THAT THERE'S A
18 REMOVABLE DRAIN BASKET HERE AND THERE'S ALSO A SINK FILTER.
19 SO IT GOES THROUGH A BASKET, THEN A FILTER. I SUPPOSE LITTLE
20 BITS COULD GET THROUGH THERE AND THOSE COULD SETTLE AT THE
21 BOTTOM.

22 THE COURT: WHAT IS THE THEORY OF HAVING THE AIR,
23 THE VOLUME OF THE DRUM NOT FILLED TO CAPACITY? IS THAT A
24 STABILIZING ELEMENT AS WELL?

25 MR. MCGOLDRICK: I KNOW THAT THAT'S HOW IT IS DONE

1 HISTORICALLY. I'M NOT SURE EXACTLY WHAT THE REASON FOR THAT
2 IS. I DO KNOW THAT THE DRUMS ARE MADE BIGGER THAN THE VOLUME
3 THAT'S ASSIGNED TO THAT PARTICULAR PARTS WASHER. SO IF IT'S
4 A 16-GALLON PARTS WASHER, IT'S ALWAYS GOING TO HAVE 16
5 GALLONS, BUT THEY ALWAYS HAVE EXTRA ROOM IN THERE. IT'S TO,
6 I SUPPOSE, FURTHER SEPARATE THE USER FROM THE SOLVENT AND
7 PERHAPS MAKES THE PUMP WORK BETTER. BUT OTHER THAN THAT, I
8 DON'T KNOW WHY.

9 THE COURT: OKAY. THANK YOU. I'M SORRY FOR
10 INTERRUPTING.

11 MR. MCGOLDRICK: NOT AT ALL. GO BACK TO SLIDE I
12 THINK IT'S EIGHT. THERE IT IS.

13 YOUR HONOR, RECENTLY OUT OF THE FIFTH CIRCUIT --
14 OBVIOUSLY NOT THE FOURTH CIRCUIT, IT'S THE FIFTH CIRCUIT --
15 IN MAY THIS ORDER CAME DOWN OR THIS OPINION CAME DOWN IN THE
16 BURST CASE. AND WE BELIEVE IT'S PARTICULARLY PERSUASIVE EVEN
17 THOUGH IT IS A FIFTH CIRCUIT CASE BECAUSE IT INVOLVES DR.
18 HARRISON AND SPECIFICALLY IT INVOLVES DR. HARRISON DOING THE
19 SAME THING HE DID IN THIS CASE.

20 BUT THERE IS A BIG DISTINCTION BETWEEN OUR CASE AND THE
21 BURST CASE. IN BURST IT INVOLVED AML. AND NONE OF THE
22 PARTIES DISPUTED GENERAL CAUSATION WITH RESPECT TO BENZENE
23 AND NHL. AND IN BURST HIS OPINION WAS BENZENE COMPONENT OF
24 GASOLINE IS WHAT CAUSED THE AML. THE GENTLEMAN WAS EXPOSED
25 TO GAS. AND HIS THEORY WAS STILL BENZENE CAUSES AML, BUT HE

1 SPECIFICALLY TALKED ABOUT THE BENZENE COMPONENT OF GASOLINE.

2 HOWEVER, HIS PROBLEM WAS HE WAS ASKED IN DEPOSITION
3 WHAT, FOR EXAMPLE, IARC FOUND WITH RESPECT TO GASOLINE
4 BECAUSE DR. HARRISON IN THAT SAME CASE AND THE SAME OPINION,
5 YOU WILL SEE HOW THEY LIST -- HE WAS CITING IARC, EPA, ATSDR,
6 ALL THOSE AGENCIES REFERRING TO THEM AS AUTHORITATIVE FOR THE
7 PROPOSITION THAT BENZENE CAUSES AML. BUT WHEN ASKED ABOUT
8 GASOLINE, HE DIDN'T KNOW. HE SAID, I DIDN'T LOOK AT THAT,
9 SORT OF LIKE THIS CASE WASN'T PART OF MY HOMEWORK. SAME
10 THING WITH STUDIES. HE COULDN'T IDENTIFY ANY STATISTICALLY
11 SIGNIFICANT STUDIES THAT ASSOCIATED GASOLINE EXPOSURE WITH
12 AML. THE COURT STRUCK IT. AND THEY STRUCK HIM ONLY ON THE
13 BASIS OF GENERAL CAUSATION. THEY NEVER EVEN GOT TO THE
14 QUESTION OF SPECIFIC CAUSATION.

15 AND THE COURT IMPORTANTLY HELD THAT WITHOUT
16 DEMONSTRATING HOW THE BENZENE LITERATURE APPLIES TO GASOLINE
17 EXPOSURE, DR. HARRISON'S METHODOLOGY LEAVES, QUOTE, TOO GREAT
18 AN ANALYTICAL GAP BETWEEN THE DATA AND THE OPINION PROFFERED.

19 AND WE'LL SEE IT ON ANOTHER SLIDE. BUT THE COURT
20 SPECIFICALLY FOUND THAT SIMPLY SAYING BENZENE IS A COMPONENT
21 AND WE KNOW BENZENE CAUSES AML IS NOT ENOUGH TO DEMONSTRATE
22 HOW IT IS THAT THE BENZENE LITERATURE APPLIES TO THAT
23 PARTICULAR SUBSTANCE AT ISSUE.

24 AND AS YOU WILL SEE ON PAGE FOUR OF THE OPINION, THE
25 COURT IMPORTANTLY NOTED THAT MULTIPLE AGENCIES INCLUDING

1 IARC, ATSDR, HAVE CONCLUDED THAT BENZENE IS CARCINOGENIC BUT
2 HAVE NOT REACHED THE SAME CONCLUSION REGARDING GASOLINE EVEN
3 THOUGH ALL GASOLINE CONTAINS BENZENE.

4 AS NOTED EARLIER, IT CAN CONTAIN UP TO LET'S SAY
5 APPROXIMATELY 50,000 PARTS PER MILLION. HARRISON WAS ASKED,
6 HOW MUCH BENZENE IS IN GASOLINE? HE SAID, WELL, I REALLY
7 DON'T KNOW, BUT IT ONLY CONTAINS, QUOTE, VERY SMALL AMOUNTS
8 OF BENZENE. HARRISON IN THIS CASE, HE DIDN'T KNOW -- HE
9 DIDN'T INDEPENDENTLY TRY TO VERIFY WHAT STEWART ASSUMED FOR
10 BENZENE CONTENT ON SOLVENT.

11 HE DIDN'T KNOW THE BENZENE CONTENT. AND HE IN FACT
12 DIDN'T KNOW WHAT TYPE OF SOLVENT WE DELIVERED. HE DIDN'T
13 KNOW IF IT WAS 150, 105. AND EVEN THOUGH BOTH OF THEM HAVE
14 VERY LOW CONTENTS, HE STILL DOESN'T KNOW. HE DIDN'T KNOW
15 WHAT WE HAD SUPPLIED, AND IT'S HIS OBLIGATION TO FOCUS ON THE
16 SPECIFIED AND CORRECT SUBSTANCE.

17 HE WAS EVEN ASKED -- I ASKED HIM, CAN YOU AT LEAST POINT
18 TO ANY STUDIES THAT HAVE LOOKED AT OTHER SUBSTANCES THAT HAVE
19 SIMILAR BENZENE CONTENTS AS SAFETY KLEEN MINERAL SPIRITS, AND
20 HE COULDN'T DO THAT. IMPORTANTLY -- AND THERE'S A SLIDE ON
21 THIS LATER -- HE IN FACT WENT SO FAR AS TO SAY, WELL LOOK,
22 LET ME LOOK AT DR. STEWART'S REPORT, WHO IS AN INDUSTRIAL
23 HYGIENIST, TO SEE WHETHER OR NOT HE HAS ANY STUDIES ABOUT
24 MINERAL SPIRITS OR SIMILAR BENZENE CONTENT SUBSTANCES AND NHL
25 AND HE COULDN'T FIND ANY.

1 SO HE HAD NOTHING AT HIS DEPOSITION. AND IN HIS REPORT
2 IN THIS CASE HE DOESN'T CITE ANY SPECIFIC STUDIES. HE ONLY
3 GENERALLY REFERS TO THE GARCIA DECLARATION WHICH AGAIN WAS A
4 DECLARATION HE DRAFTED FOR A DIFFERENT CASE EIGHT YEARS AGO.

5 THE COURT: NOW, WAS THAT GARCIA CASE A MINERAL
6 SPIRITS CASE OR WAS IT A DIFFERENT COMPOUND?

7 MR. MCGOLDRICK: IT WAS TOTALLY DIFFERENT. IT
8 INVOLVED THE PRINTING INDUSTRY. AND MR. BOYKIN'S
9 OCCUPATIONAL EXPOSURE IS VERY RELEVANT THERE BECAUSE HE
10 WORKED AS A PRINTER AS WELL. DR. HARRISON HAS TESTIFIED IN
11 DEPOSITION, HAS WRITTEN REPORTS, TESTIFIED AT TRIAL, THAT THE
12 PRINTING INDUSTRY IS CARCINOGENIC AND IT CAUSES EVEN NHL.

13 THOSE CASES INVOLVE LOTS OF DIFFERENT CHEMICALS. THERE
14 MAY HAVE BEEN SOME SOLVENTS. BUT AS A WHOLE, THERE ARE --
15 YOU CAN'T COMPARE. IT'S APPLES AND ORANGES. AND WE KNOW
16 JUST FROM A BENZENE STANDPOINT, IF YOU JUST WANT TO LOOK AT
17 BENZENE, OBVIOUSLY THE EXPOSURES ARE FAR GREATER. IN THIS
18 CASE AS MUCH AS 83 OR MORE PERCENT OF MR. BOYKIN'S EXPOSURE
19 DR. STEWART ATTRIBUTED TO HIS WORK AS A PRINTER BACK IN THE
20 70'S.

21 IN THIS CASE DR. HARRISON AGREED THAT IARC AND THE US
22 EPA AND THE NATIONAL TOXICOLOGY PROGRAM ARE AUTHORITATIVE
23 BODIES, AND THAT'S WHAT HE CALLED THEM. THEY ARE
24 AUTHORITATIVE. BUT AGAIN, WHEN IT DOESN'T SUIT HIM, IF IT
25 INVOLVES A DISEASE PROCESS THAT'S NOT LINKED LET'S SAY LIKE

1 NHL OR IT INVOLVES A SUBSTANCE LIKE MINERAL SPIRITS THAT
2 HASN'T BEEN FOUND TO CAUSE CANCER, HE DOESN'T CITE THEM AND
3 HE TRIES TO IGNORE THEM.

4 AND THESE SAME BODIES THAT HE DIDN'T KNOW HOW THEY
5 CLASSIFIED MINERAL SPIRITS IN THIS CASE ARE THE VERY ONES
6 THAT HE RELIED ON BACK IN THE BURST CASE.

7 NEXT SLIDE, PLEASE. THANKS, JOHN. WHEN HE WAS ASKED --
8 THE SPECIFIC QUESTION WAS: DR. HARRISON, HOW DOES IARC
9 CLASSIFY MINERAL SPIRITS IN TERMS OF ITS CARCINOGENICITY IN
10 FUMES? THAT SHOULD HAVE SAID CARCINOGENIC -- HOW DOES --
11 I'LL FIGURE OUT WHAT THAT MEANS. I WOULD HAVE TO LOOK THAT
12 UP WAS HIS ANSWER. IARC HAS A HUNDRED PLUS VOLUMES AND I
13 BELIEVE THEY HAVE REVIEWED MINERAL SPIRITS, BUT I DON'T KNOW
14 WHAT THE CLASS IS OR WHAT CLASS THEY PUT IT IN.

15 SO, HE ACKNOWLEDGED THAT, YEAH, I THINK THEY'VE LOOKED
16 AT MINERAL SPIRITS. BUT IN A CASE INVOLVING A DEFENDANT WHO
17 SUPPLIED MINERAL SPIRITS, HE DIDN'T EVEN LOOK TO SEE HOW THEY
18 CLASSIFIED IT IN TERMS OF ITS CARCINOGENICITY.

19 AND IF YOU COMPARE -- COMPARE THAT TO IARC'S OFFICIAL
20 STATEMENT ON MINERAL SPIRITS, IARC HAS STUDIED MINERAL
21 SPIRITS AND CONCLUDED, QUOTE, INADEQUATE EVIDENCE FOR THE
22 CARCINOGENICITY OF MINERAL SPIRITS IN HUMANS. OH, THAT FUMES
23 WORD, YOUR HONOR, THAT SHOULD HAVE BEEN HUMANS.

24 THE COURT: SHOULD HAVE BEEN WHAT?

25 MR. MCGOLDRICK: HUMANS.

1 THE COURT: HUMANS.

2 MR. MCGOLDRICK: NEXT SLIDE, PLEASE. HERE ARE HOW
3 THE AGENCIES -- OR THE AGENCIES THAT HAVE SPECIFICALLY LOOKED
4 AT MINERAL SPIRITS. YOU'VE GOT THE WHO IARC'S OR PART OF THE
5 WHO, THE INTERNATIONAL ASSOCIATION FOR RESEARCH ON CANCER
6 EPA, ATSDR AND ACGIH.

7 COURT REPORTER: CAN YOU SLOW DOWN?

8 MR. MCGOLDRICK: SORRY. EPA, ATSDR AND ACGIH.
9 NONE OF THEM HAVE DETERMINED THAT MINERAL SPIRITS CAUSE NHL
10 OR CANCER. NONE OF THEM REGULATES MINERAL SPIRITS AS A
11 CARCINOGEN. AND AGAIN, THESE ARE THE SAME AUTHORITATIVE
12 BODIES HARRISON OFTEN CITES.

13 PUTTING ASIDE THAT HE LOOKED AT THE WRONG SUBSTANCE AND
14 PUTTING ASIDE WHAT EVERYONE HAS FOUND WITH RESPECT TO MINERAL
15 SPIRITS, LET'S JUST LOOK AT BENZENE AND NHL. IT'S DIFFERENT
16 FROM AML IN THE FOLLOWING RESPECTS. IARC HAS CONCLUDED AGAIN
17 BENZENE CAUSES AML. THERE'S NO DISPUTE. THE ONLY DISPUTE
18 THERE IS HOW MUCH.

19 AND IN TERMS OF NON-HODGKIN'S LYMPHOMA, IARC HAS
20 CONCLUDED LIMITED EVIDENCE OF CARCINOGENICITY. SO EVEN IN
21 PUTTING ASIDE THAT HE LOOKED AT THE WRONG SUBSTANCE AND MADE
22 THE WRONG INQUIRY, NHL IS VERY MUCH DISPUTED WHETHER OR NOT
23 BENZENE, EVEN PURE BENZENE AT ANY LEVEL, CAN CAUSE IT. IN
24 FACT, MOST OF THE STUDIES OUT THERE THAT HAVE LOOKED AT
25 BENZENE AND NHL HAVE FOUND THAT THERE IS NO ASSOCIATION.

1 AND IF YOU LOOK AT THE NATIONAL TOXICOLOGY PROGRAM, THEY
2 CONCLUDED LITTLE EVIDENCE WAS FOUND FOR AN ASSOCIATION
3 BETWEEN BENZENE EXPOSURE AND MULTIPLE MYELOMA OR
4 NON-HODGKIN'S LYMPHOMA. NEXT SLIDE.

5 YOU WILL SEE THE BOTTOM OF THIS SLIDE, YOUR HONOR, IS
6 WHAT I MENTIONED EARLIER FROM THE BURST CASE. THE COURT
7 SAID, QUOTE, THE SIMPLE EXPLANATION THAT MINERAL SPIRITS --
8 IN THAT CASE THEY WERE TALKING ABOUT GASOLINE -- CONTAINS
9 BENZENE AND BENZENE IS A KNOWN CARCINOGEN CANNOT BE
10 JUSTIFICATION FOR SUCH EXTRAPOLATION.

11 HERE ARE SOME OF THE CASES WE CITED IN OUR BRIEF.
12 BASICALLY THE PROPOSITION IS WHERE YOU HAVE EPIDEMIOLOGY,
13 WHICH IS CONSIDERED THE BEST EVIDENCE ON CAUSATION, AND IT
14 EXISTS AND IT'S RELEVANT, YOU'VE GOT TO LOOK AT IT AND YOU
15 HAVE GOT TO DEAL WITH IT. IT CAN'T BE IGNORED.

16 PLAINTIFFS RELY HEAVILY IN THIS CASE, YOUR HONOR, ON --
17 OR IN THEIR RESPONSE ON TWO CASES. ONE IS THE BENEDI CASE
18 AND ONE IS THE WESTBERRY CASE. IN FACT, THOSE ARE THE TWO
19 THEY REALLY FOCUS ON IN THEIR RESPONSE.

20 IN TERMS OF THE BENEDI CASE, IT'S VERY MUCH FACTUALLY
21 DISTINGUISHABLE FROM THIS CASE. IN BENEDI IT WAS A CASE THAT
22 INVOLVED A PLAINTIFF WHO HAD TAKEN ACETAMINOPHEN, HE GOT IT
23 FROM TYLENOL, AND WAS DRINKING ALCOHOL WITH IT. AND
24 OBVIOUSLY TYLENOL IS NOT UBIQUITOUS, IT'S NOT EVERYWHERE.
25 BENZENE IS.

1 THE DISEASE AT ISSUE IN THAT CASE WAS LIVER DAMAGE.
2 HERE WE HAVE NON-HODGKIN'S LYMPHOMA. IN BENEDI IT WASN'T A
3 SITUATION WHERE YOU HAD A PROBLEM WITH IDIOPATHIC DISEASE.
4 HERE OBVIOUSLY DR. HARRISON HAS TESTIFIED IN THIS CASE THAT
5 THE MAJORITY OF NON-HODGKIN'S LYMPHOMA CASES ARE IDIOPATHIC
6 OR OF NO KNOWN CAUSE.

7 IN BENEDI THE COURT REALLY -- THERE'S ALSO TEMPORALITY
8 IN BENEDI. WITHIN FIVE DAYS OF STARTING TO TAKE THE
9 ACETAMINOPHEN AND DRINKING ALCOHOL HE WAS IN THE HOSPITAL
10 WITH LIVER DAMAGE. IN THIS CASE BY CONTRAST DR. HARRISON HAS
11 TESTIFIED THAT WHAT HE CALLS AND WHAT IS CALLED A LATENCY
12 PERIOD IS AS MUCH AS 40 YEARS. FORTY YEARS OF EXPOSURE IS IN
13 THE WHEELHOUSE FOR DR. HARRISON BEFORE HE DEVELOPED A
14 DISEASE. THAT IS THE ANTITHESIS OF TEMPORAL PROXIMITY.

15 IN BENEDI THERE WAS NO EPIDEMIOLOGICAL LITERATURE. THE
16 NORRIS CASE ACTUALLY LOOKED AT IT BECAUSE SOMEONE TRIED TO
17 MAKE THE SAME ARGUMENT AND SAID NO, NO, NO, NO, THERE'S NO
18 EPI STUDIES IN BENEDI, AND THAT'S A BIG DIFFERENCE. IF
19 THERE'S NOT EPI STUDIES OUT THERE, DOES THAT MEAN AN EXPERT
20 CAN'T SOMEHOW RELY ON OTHER SOURCES WITH A RELIABLE
21 METHODOLOGY? NO. BUT WHEN THEY ARE OUT THERE, EVEN ALL
22 SCIENTISTS WOULD AGREE YOU CAN'T IGNORE THEM.

23 I MEAN, REASONABLE SCIENTISTS MIGHT DISAGREE ON A
24 PARTICULAR STUDY'S FINDINGS, BUT THEY ARE GOING TO AGREE THAT
25 YOU HAVE TO AT LEAST LOOK AT THE DATA OUT THERE IF IT'S EPI

1 LITERATURE, IARC, ET CETERA, AND IT'S ON POINT.

2 AND IMPORTANTLY EVEN IN BENEDI, THERE'S NOT A PROBLEM
3 WITH FAILURE TO RULE OUT SOLE CAUSE. IN THIS CASE THERE IS.
4 I MEAN, THERE'S A NUMBER OF THINGS THAT DR. HARRISON CAN'T
5 RULE OUT. BUT WITH RESPECT TO THE PRINTING INDUSTRY, HE
6 SPECIFICALLY TESTIFIED, YOU'RE RIGHT, I CAN'T RULE IT OUT AS
7 A SOLE CAUSE, A SOLE CAUSE. NOT A CONTRIBUTING CAUSE, NOT A
8 SUBSTANTIAL CAUSE, A SOLE CAUSE. NEXT SLIDE.

9 SO THE NORRIS CASE THAT WE JUST SAW EARLIER, IT MAKES
10 CLEAR THAT EPI DOESN'T NECESSARILY END THE INQUIRY, BUT WHERE
11 IT EXISTS, YOU CAN'T IGNORE IT. THAT'S THE HUGE POINT HERE.
12 I MEAN, IN TERMS OF WHAT CERTAIN STUDIES SHOW AND PLAINTIFFS
13 HAVE FILED A RESPONSE ABOUT, WELL, THIS STUDY SAYS THIS, WE
14 FOUND THIS STUDY THAT SAYS THAT, AND WE CAN TALK ABOUT IT.

15 BUT THE MORE RELEVANT INQUIRY AND THE MORE IMPORTANT OR
16 BIGGER PROBLEM HERE IS NOT SO MUCH WHETHER OR NOT THAT WAS A
17 WELL-DESIGNED STUDY, NOT SO MUCH WHETHER IT WAS STATISTICALLY
18 SIGNIFICANT, BUT IT'S THE FACT THAT HE DIDN'T EVEN CHOOSE TO
19 LOOK AT THEM. THE GOOD, THE BAD, AND THE UGLY, YOU'VE GOT TO
20 LOOK AT WHAT'S OUT THERE. AND IN THIS CASE IMPORTANTLY,
21 UNLIKE BENEDI WHERE THERE WAS NO BODY OF EPIDEMIOLOGICAL
22 LITERATURE, HARRISON TESTIFIED THAT THERE ARE, QUOTE,
23 HUNDREDS OF EPIDEMIOLOGICAL STUDIES ON BENZENE AND NHL.

24 AND AS SET FORTH IN THE BAUSCH AND LOMB CASE CITED
25 THERE, AN EXPERT'S FAILURE TO ADDRESS IT RENDERS THEIR THEORY

1 OR HIS OR HER THEORY UNRELIABLE. AND THAT'S ONE OF THE
2 SAME -- ONE OF THE REASONS DR. HARRISON'S METHODOLOGY IS
3 UNRELIABLE.

4 IN THIS CASE DR. HARRISON -- AND AGAIN, PUTTING ASIDE
5 MINERAL SPIRITS, LET'S JUST TALK ABOUT BENZENE LITERATURE AND
6 NHL. WITH RESPECT TO THE LITERATURE HE DID CLAIM TO REVIEW,
7 HE APPLIED THE BRADFORD HILL CRITERIA. THOSE ARE
8 WELL-ACCEPTED CRITERIA. DR. HARRISON'S DECLARATION TALKS
9 ABOUT THEM.

10 BUT IMPORTANTLY AND MOST IMPORTANTLY THEY ARE HIS
11 CRITERIA. THEY ARE THE ONES HE SAYS HE USES TO ARRIVE AT HIS
12 CONCLUSION. AND THERE'S A BUNCH OF DIFFERENT CRITERIA. THE
13 TWO MOST IMPORTANT ONES -- AND EVEN DR. HARRISON AGREES WITH
14 THIS -- IS CONSISTENCY OF ASSOCIATION AND THE STRENGTH OF
15 ASSOCIATION. IT'S NOT ENOUGH TO HAVE THE MOST -- THE BEST
16 STUDY IN THE WORLD, LOTS OF STATISTICAL SIGNIFICANCE, MAYBE
17 40,000 WORKERS ARE STUDIED AND IT HAS A POSITIVE FINDING.
18 YOU'VE GOT TO SEE THAT FINDING REPRODUCED. REPRODUCIBILITY
19 IS ANOTHER WORD FOR CONSISTENCY. AND STRENGTH OF ASSOCIATION
20 IS ANOTHER IMPORTANT CONCEPT THERE.

21 REAL QUICK JUST DISCUSSION OF THE STATISTICS INVOLVED IN
22 THESE STUDIES. RELATIVE RISK IS A WORD YOU WILL HEAR. IT'S
23 BASICALLY WHAT IS YOUR RISK AS COMPARED TO THE UNEXPOSED
24 POPULATION. SOME COURTS -- WELL, EVERY COURT REQUIRES IN
25 TERMS OF STATISTICAL SIGNIFICANCE YOU HAVE TO BE AT GREATER

1 THAN A 1.0, WHICH MEANS YOUR CHANCE OF DEVELOPING WHATEVER
2 DISEASE IS SLIGHTLY HIGHER THAN THE GENERAL POPULATION.

3 AND IF IT'S STILL STATISTICALLY SIGNIFICANT AT LET'S SAY
4 A 1.2, WELL THAT'S A WEAK FINDING, BUT IT'S STATISTICALLY
5 SIGNIFICANT. SOME COURTS REQUIRE MORE THAN THAT INCLUDING
6 THE FEDERAL JUDICIAL CENTERS REFERENCE MANUAL ON SCIENTIFIC
7 EVIDENCE. AND WHAT THOSE COURTS SAY IS, LOOK, WE LIKE TO GET
8 TO 2.0 BECAUSE IF YOU HAVE A DOUBLING OF THE RISK, THERE'S
9 JUST LESS CHANCE OF CONFOUNDING OR BIAS OR ERROR OR WHATEVER
10 BEING THE CAUSE OF THE FINDING.

11 AND IN TERMS OF STATISTICAL SIGNIFICANCE, AGAIN YOU HAVE
12 TO BE GREATER THAN 1.0 AND THEN YOU'LL SEE THOSE BRACKETS
13 KNOWN AS CONFIDENCE INTERVALS THAT ARE PUT BEHIND WHATEVER
14 FINDING. IF THAT CONFIDENCE INTERVAL INCLUDES THE NUMBER
15 1.0, THEN IT'S NOT STATISTICALLY SIGNIFICANT. SO YOU MAY SEE
16 .9 TO 3.8. THAT'S NOT STATISTICALLY SIGNIFICANT. EVEN IF
17 ONE IS IN THERE, 1.0 TO 3.8, IT INCLUDES ONE, YOU CAN'T RULE
18 OUT CHANCE.

19 AND HERE IS A QUOTE FROM HARRISON'S GARCIA DECLARATION
20 WHERE HE TALKS ABOUT STRENGTH OF AN OBSERVED ASSOCIATION. HE
21 WRITES THAT FINDING OF LARGE PRECISE RISKS WHICH REFLECT
22 INCREASED CONFIDENCE THAT AN ASSOCIATION IS NOT LIKELY DUE TO
23 CHANCE, BIAS OR CONFOUNDING FACTORS. AND AGAIN, CONSISTENCY
24 OF ASSOCIATION. HARRISON DEFINES THAT AS PATTERN OF ELEVATED
25 RISKS OBSERVED ACROSS SEVERAL INDEPENDENT STUDIES WOULD

1 SUPPORT OR STRENGTHEN AN INFERENCE OF CAUSALITY.

2 REPRODUCIBILITY OF FINDINGS CONSTITUTES ONE OF THE STRONGEST
3 ARGUMENTS FOR CAUSALITY. AND THOSE ARE HARRISON'S WORDS.

4 AND DR. HARRISON DIDN'T CONSIDER STRENGTH OR CONSISTENCY
5 IN THIS CASE. HE TESTIFIED THERE'S HUNDREDS OF STUDIES YET
6 HE COULDN'T TELL ME WHAT PERCENTAGE OF THOSE SHOWED A
7 STATISTICALLY SIGNIFICANT ASSOCIATION. WHEN ASKED IF, WELL,
8 IS IT MORE THAN HALF? HE STILL COULDN'T ANSWER THAT -- THAT
9 QUESTION. HE SAID, I JUST DON'T KNOW, I DIDN'T DO THAT
10 ANALYSIS.

11 HE DIDN'T EVEN KNOW IF ANY OF THE STUDIES INVOLVED
12 SUBSTANCES THAT HAD SIMILAR BENZENE CONCENTRATIONS AS MINERAL
13 SPIRITS. AGAIN HIS ANSWER WAS, I DON'T KNOW, THAT WASN'T
14 PART OF MY HOMEWORK. AND HE ALSO DIDN'T DO A FOREST PLOT.
15 NOT SAYING THAT THAT'S REQUIRED. BUT WHAT A FOREST PLOT IS
16 IS IT TAKES ALL THE STUDIES WITH 1.0 BEING THE MIDLINE AND
17 YOU GET A SENSE OF HOW STRONG THEY ARE, HOW MANY ARE BELOW
18 1.0, WHERE MOST OF THEM ARE FALLING. HE DIDN'T EVEN DO ONE
19 OF THOSE. I MEAN, THAT WOULD GIVE YOU A SENSE AS TO WHAT
20 SORT OF CONSISTENCY IS OUT THERE WITHOUT KNOWING AN ACTUAL
21 NUMBER; OF THE 198 THIS MANY WERE POSITIVE.

22 HE WAS ALSO ASKED ABOUT IF -- WHETHER OR NOT HE COULD
23 IDENTIFY ANY STUDY INVOLVING BENZENE, FORGET ABOUT MINERAL
24 SPIRITS, AND NHL THAT HAD A 2.0 OR GREATER RELATIVE RISK.
25 AND THE QUESTION WAS: DR. HARRISON, DO YOU KNOW WHETHER OR

1 NOT THERE ARE ANY EPIDEMIOLOGICAL STUDIES THAT SHOW A
2 STATISTICALLY SIGNIFICANT INCREASED RISK OF MORE THAN 2.0 IN
3 TERMS OF BENZENE EXPOSURE -- SHOULD HAVE SAID AND NHL?

4 ANSWER WAS: NOT AS I SIT HERE TODAY, I HAVE NOT DONE IT AS
5 PART OF MY HOMEWORK ON THIS CASE.

6 SIMILARLY IN THE BURST CASE HE WAS ASKED THE SAME
7 QUESTION ABOUT GASOLINE EXPOSURE STUDIES AND HE RESPONDED,
8 QUOTE, I DON'T KNOW, I WOULD HAVE TO EXAMINE THE PAPERS. I'M
9 NOT PREPARED TO ANSWER YOUR QUESTION HERE, AND HE WAS
10 ULTIMATELY EXCLUDED AS UNRELIABLE. AND THE COURT IN THAT
11 CASE NOTED THERE WAS NOTHING IN HIS REPORT AND NOTED THAT HE
12 WAS UNABLE AT DEPOSITION TO ANSWER THAT QUESTION.

13 DR. HARRISON'S OLD GARCIA DECLARATION DOESN'T SAVE HIM
14 HERE. I MEAN, THINK ABOUT IT FOR A SECOND. HE HAS DRAFTED A
15 DECLARATION INVOLVING A VERY DIFFERENT CASE, DIFFERENT
16 EXPOSURES, DIFFERENT PLAINTIFF FROM EIGHT YEARS AGO. HE
17 DOESN'T FIT THE FACTS OF THIS CASE. HE DOESN'T EVEN FIT THE
18 STYLE OF THE CASE NAME AND FACTS OF THIS CASE. AND IF THAT
19 WERE ENOUGH, HE COULD JUST WALK AROUND WITH THAT NEXT -- NEXT
20 TIME HE HAS A CASE, IN A MONTH WHEN HE TESTIFIES. NEXT YEAR
21 IT WILL BE NINE YEARS OLD, BUT IT WILL STILL BE GOOD ENOUGH,
22 AND THE YEAR AFTER THAT. HE'S GOT TO DO SOMETHING WITH IT.

23 HE DIDN'T UPDATE THE STUDIES IN THIS CASE. HE DIDN'T GO
24 THROUGH AND SAY, OH WELL, YOU KNOW WHAT, THIS STUDY HAS BEEN
25 CRITICIZED HERE. HE DIDN'T DO ANY UPDATES. HE JUST REFERRED

1 TO IT IN HIS REPORT WHOLESAL. AND NOT ONLY DID HE NOT
2 UPDATE IT BUT HE DIDN'T DO ANYTHING TO FIT IT TO THE FACTS OF
3 THIS CASE. HE DIDN'T EVEN LOOK AT IT TO SEE IF IT HAD
4 ANYTHING TO DO WITH MINERAL SPIRITS IN THERE.

5 SPECIFIC CAUSATION IS WHETHER OR NOT A PARTICULAR
6 SUBSTANCE -- AGAIN, IF YOU LOOK AT THE CASES, IT WAS A
7 GASOLINE CASE, IT WOULD BE GAS, FOR US IT WOULD BE MINERAL
8 SPIRITS -- WHETHER OR NOT THAT CAUSED A PARTICULAR
9 INDIVIDUAL'S INJURY. AND EVEN IF A PLAINTIFF -- A PLAINTIFF
10 EXPERT CAN ESTABLISH THAT MINERAL SPIRITS CAUSES NHL, WHICH
11 DR. HARRISON CAN'T, HE STILL COULDN'T ESTABLISH SPECIFIC
12 CAUSATION WITH RESPECT TO MR. BOYKIN.

13 AND IT'S IMPORTANT TO NOTE THERE IS NO DIAGNOSTIC TEST
14 FOR DETERMINING WHETHER OR NOT NHL WAS CAUSED BY BENZENE OR
15 ANY OTHER CHEMICAL. IN FACT, AS WE SAW, MOST OF THE CASES
16 ARE IDIOPATHIC, SO EVEN THE BEST SCIENTISTS IN THE WORLD
17 DON'T KNOW WHAT CAUSES THEM. BUT IT'S NOT AS THOUGH, YOU
18 KNOW, YOU HAVE ASBESTOSIS OR SOMETHING. IT'S UBIQUITOUS
19 CHEMICAL. AND IN TERMS OF CAUSES OF THE DISEASE AND YOU HAVE
20 GOT GENETIC FACTORS, YOU HAVE GOT FAMILY HISTORY FACTORS, YOU
21 HAVE GOT ALL KINDS OF RISK FACTORS, VIRUSES, ESPECIALLY WITH
22 NHL VIRUSES.

23 THE COURT: SO IT WOULDN'T ARISE FROM A TOXICOLOGY
24 REPORT OR --

25 MR. MCGOLDRICK: CORRECT. CORRECT.

1 THE COURT: -- KIND OF AUTOPSY.

2 MR. MCGOLDRICK: THAT'S CORRECT. AND DESPITE ALL
3 THAT, IT WAS DR. HARRISON THAT CHOSE TO USE A DIFFERENTIAL
4 DIAGNOSIS IN THIS CASE TO SUPPORT HIS SPECIFIC CAUSATION
5 OPINION. DIFFERENTIAL DIAGNOSIS IS -- IT'S A STANDARD
6 SCIENTIFIC TECHNIQUE THAT DOCTORS USE ESPECIALLY WITH
7 PATIENTS, AND IT'S A PROCESS OF RULING IN A MOST LIKELY CAUSE
8 BY RULING OUT ALL THE OTHER POTENTIAL CAUSES.

9 AND NOT ONLY DO YOU HAVE TO RULE THEM OUT, BUT IF YOU
10 LOOK AT THE CASE LAW, IT REQUIRES YOU TO RULE THEM OUT WITH
11 REASONABLE MEDICAL CERTAINTY. KIND OF -- IT'S MORE THAN
12 MORE-LIKELY-THAN-NOT. AND IN THIS CASE, WHATEVER HARRISON
13 DID IT'S NOT A DIFFERENTIAL DIAGNOSIS THAT WE'LL SEE IN A FEW
14 SLIDES HERE. HE RULED EVERYTHING IN AND HE BELIEVES HE HAS
15 THE RIGHT TO RULE EVERYTHING IN AND NOT RULE ANYTHING OUT.

16 WELL, YOU CAN'T RULE ANYTHING IN UNTIL YOU HAVE RULED
17 EVERYTHING OUT WITH REASONABLE PARTICULARITY. AND HIS NOTION
18 THAT, WELL, ALL OF THESE THINGS CONTRIBUTE, THERE IS NO SAFE
19 THRESHOLD, THEY ALL JUST GET ON THE GRAVY TRAIN AND WE RULE
20 THEM IN, THAT'S NOT A DIFFERENTIAL DIAGNOSIS. I DON'T KNOW
21 WHAT IT'S CALLED, BUT IT'S NOT A DIFFERENTIAL DIAGNOSIS.

22 AND ESPECIALLY HERE BECAUSE DR. HARRISON TESTIFIED THAT
23 MOST CASES ARE IDIOPATHIC, WHEN YOU LOOK AT THE CASE LAW,
24 THEY SAY, NO, NO, NO, YOU CAN'T USE A DIFFERENTIAL DIAGNOSIS
25 WHEN MORE THAN HALF THE CASES HAVE AN UNKNOWN CAUSE. HOW DO

1 YOU DO THAT? HOW DO YOU KNOW THAT THIS PATIENT ISN'T ONE OF
2 THE PEOPLE OR THIS PERSON ONE OF THE PEOPLE IN THAT
3 GREATER-THAN-50-PERCENT CATEGORY? YOU DON'T. SO THEY VIEW
4 WITH GREAT SUSPICION ANY EFFORTS TO USE DIFFERENTIAL
5 DIAGNOSIS WHEN YOU HAVE IDIOPATHIC CAUSE.

6 OTHER CASES TALK ABOUT A RELATED TOPIC WHICH IS THEY
7 VIEW WITH SUSPICION USE OF A DIFFERENTIAL DIAGNOSIS WHEN YOU
8 HAVE A UBIQUITOUS CHEMICAL. WE ARE ALL BREATHING IT RIGHT
9 NOW. AND WITH RESPECT TO DR. HARRISON, I DON'T KNOW WHO
10 WOULD BE IN THAT IDIOPATHIC CATEGORY MORE THAN 50 PERCENT
11 BECAUSE APPARENTLY, ACCORDING TO HIM, IF YOU WORK AT ANY
12 OCCUPATIONAL EXPOSURE TO ANY AMOUNT LET'S SAY OF BENZENE,
13 YOU'RE NOT IDIOPATHIC. HE CLAIMS THAT WHEN HE RULES IN THAT
14 RISK FACTOR, IT MEANS IT'S NOT IDIOPATHIC.

15 SO ANYONE WHO HAS HAD ANY OCCUPATIONAL EXPOSURE IS NOT
16 IN THAT GREATER-THAN-50-PERCENT CATEGORY. AND THEN AS WE
17 WILL SEE, HE WAS EVEN ASKED, WHAT ABOUT AMBIENT AIR? CAN YOU
18 RULE THAT OUT? HE COULDN'T. SO UNLESS YOU'RE BREATHING IN A
19 BUBBLE, NOT WORKING, I DON'T KNOW WHO IS IN THAT
20 GREATER-THAN-50-PERCENT CATEGORY.

21 THE OTHER CASE THAT PLAINTIFFS RELY HEAVILY ON IS THE
22 WESTBERRY CASE AND THAT SIMILARLY DOES NOT SAVE DR.
23 HARRISON'S FLAWED DIFFERENTIAL DIAGNOSIS. IN THAT CASE THE
24 SUBSTANCE AT ISSUE WAS TALC, TALCUM POWDER BASICALLY, TALC.
25 AND IT'S NOT UBIQUITOUS LIKE BENZENE. AND THE DISEASE AT

1 ISSUE WAS SINUS PROBLEMS; WASN'T NHL. AND WAS THERE AN ISSUE
2 WITH IDIOPATHIC DISEASE? NO.

3 THE ONLY THING YOU HAVE SEEN IN THIS ENTIRE CASE IS THE
4 RESPONSE OF PLAINTIFFS' COUNSEL WHEREIN ON PAGE THREE, AS I
5 RECALL, THEY SAY, WITHOUT BASIS, WITHOUT CITATION, THEY JUST
6 SIMPLY AVER THAT, WELL, YOU'D BE HARD-PRESSED TO FIND A
7 DISEASE WITH MORE UNKNOWN CAUSES THAN A SINUS INFECTION.
8 WELL, THERE'S NO EVIDENCE FROM THE CASE WHATSOEVER THAT THE
9 IDIOPATHIC ISSUE WAS OF CONCERN TO THE COURT.

10 AND MOST IMPORTANTLY, THE COURT ALLOWED THIS
11 DIFFERENTIAL DIAGNOSIS FOR A NUMBER OF VERY SPECIFIC REASONS.
12 ONE WAS THE TEMPORAL PROXIMITY. HE'D BE EXPOSED TO THE TALC
13 POWDER, HE WOULD GET WORSE SINUS SYMPTOMS. AND YOU WILL SEE
14 THAT IN SOME OF THE CASES. WHERE YOU HAVE CLOSE PROXIMITY,
15 THAT GIVES A LITTLE MORE CREDENCE TO THE DIFFERENTIAL
16 DIAGNOSIS IN THE ULTIMATE CONCLUSION.

17 HERE BY CONTRAST WE HAVE A 40-YEAR LATENCY PERIOD. WE
18 WILL SEE IN A MOMENT THAT THIS LYMPHOMA WAS, ACCORDING TO
19 HARRISON, MOST LIKELY PRESENT IN 2000. SO WE ARE GOING BACK
20 TO 1960. SO, THAT'S THE OTHER END OF THE SPECTRUM FROM CLOSE
21 TEMPORAL PROXIMITY. AND HERE THERE WAS NO -- IN THE
22 WESTBERRY CASE THERE WAS NO PROBLEM WITH RULING OUT A SOLE
23 CAUSE AS COMPARED TO OUR CASE WHERE THERE IS.

24 ANOTHER IMPORTANT CONSIDERATION THAT THE COURT NOTED --
25 I MEAN, THIS -- THIS GENTLEMAN WAS -- HIS WORK AREA, HE HAD

1 HAD FOOTPRINTS IN THE WHITE POWDER. THERE WAS CLOUDS OF
2 TALCUM POWDER. AND THE DOCTOR OFFERING THE OPINION TOOK HIM
3 OUT OF THE WORK PLACE PURPOSEFULLY TO SEE IF HIS SYMPTOMS
4 WOULD RESOLVE, AND THE COURT NOTED THAT HE DID THAT AND IN
5 FACT THEY DID RESOLVE OR GET BETTER.

6 SO, IT'S A VERY, VERY DIFFERENT SITUATION FROM THIS
7 CASE. AND IMPORTANTLY, IT WASN'T AS THOUGH THERE WAS A BUNCH
8 OF EPIDEMIOLOGICAL LITERATURE OUT THERE. THERE WASN'T. SO
9 THE COURT ALLOWED IT.

10 IMPORTANTLY IN THIS CASE DR. HARRISON TESTIFIED THAT HE
11 FAILED TO RULE OUT PRINTING EXPOSURES THAT MR. BOYKIN HAD
12 WHILE WORKING AS A PRINTER AS THE SOLE CAUSE. THE QUESTION
13 WAS: CAN YOU RULE OUT HIS EXPOSURE TO BENZENE AS A PRINTER
14 AS BEING THE SOLE CAUSE OF HIS NON-HODGKIN'S LYMPHOMA? DR.
15 HARRISON ANSWERED, I CAN'T RULE IT OUT COMPLETELY. I DON'T
16 THINK IT'S LIKELY COMPARED TO THE BENZENE EXPOSURE HE HAD AT
17 YAMAHA, BUT HE DID WORK AS A PRINTER AND HE COULD HAVE HAD
18 BENZENE EXPOSURE DURING THAT TIME. THAT WAS HIS ANSWER AT
19 DEPOSITION.

20 GO TO THE NEXT LINE. ACTUALLY COULD YOU PLEASE GO BACK
21 TO THE PRIOR SLIDE? SORRY. IT'S IMPORTANT TO NOTE IN TERMS
22 OF PRINTING EXPOSURES -- OH, YEAH. ALL RIGHT. SO WE ARE
23 GOING TO COMING UP TO THE SLIDE. YOU WILL SEE HERE BASED ON
24 HIS ANSWER HE TRIED TO MINIMIZE THE PRINTING ROLE AT THE TIME
25 OF HIS DEPOSITION BY SUGGESTING THAT THE EXPOSURES WERE

1 PROBABLY LESS THAN MR. BOYKIN'S EXPOSURES AT YAMAHA. SO
2 LET'S GO FORWARD. CAN WE GO FORWARD ONE MORE SLIDE AND WE
3 WILL GO BACK.

4 ALL RIGHT. HERE THIS IS AN IMPORTANT POINT TO CONSIDER.
5 YOU WILL SEE AT THE TOP OF THIS SLIDE THERE'S A TABLE TWO AND
6 AT THE BOTTOM OF THE SLIDE THERE'S ANOTHER TABLE TWO. THIS
7 IS A TABLE THAT WAS PREPARED BY DR. STEWART. AND YOU WILL
8 SEE THE FIRST ITERATION IS THE ONE AT THE TOP. HE'S GOT
9 NOTHING ON THE LINE FOR PRINTER WHERE IT SAYS 1973 TO 1979.

10 AND IF YOU LOOK AT THE BOTTOM YOU SEE THE TOTAL PPM
11 YEARS RANGE. THE LOW, ACCORDING TO DR. STEWART -- OBVIOUSLY
12 WE TAKE ISSUE WITH HIS NUMBERS -- BUT IT'S -- THE LOW IS 25.2
13 PPM YEARS AND THE HIGH IS 133.8 PPM YEARS. DR. HARRISON
14 THOUGHT WHEN HE FIRST FORMED HIS OPINION WRITING HIS REPORT
15 AND WHEN HE WAS ANSWERING OUR QUESTIONS UNDER OATH AT HIS
16 DEPOSITION -- TWO DAYS OF IT -- THAT THAT TOTAL RANGE FOR ALL
17 OF MR. BOYKIN'S CUMULATIVE EXPOSURE AS CALCULATED BY DR.
18 STEWART WAS ATTRIBUTABLE TO HIS WORK AS A MOTORCYCLE MECHANIC
19 AT COLUMBIA YAMAHA.

20 LITTLE DID DR. HARRISON KNOW -- AND WE KNEW AT HIS
21 DEPOSITION, OR AT LEAST I HAD A COPY OF THIS, SO I DON'T KNOW
22 IF HE DIDN'T GET IT OR WHAT HAPPENED. BUT IF YOU LOOK AT THE
23 BOTTOM, DR. STEWART HAD ALREADY REVISED HIS REPORT. AND YOU
24 WILL SEE THAT EVERYTHING JUST MOVED UP A LINE. AND THAT
25 MASSIVE RANGE OF 9.1 ON THE BOTTOM UP TO 112 PPM YEARS IS ALL

1 ACCORDING TO DR. STEWART ATTRIBUTABLE TO MR. BOYKIN'S WORK AS
2 A PRINTER FROM 1973 TO 1979.

3 AND IN FACT, DR. HARRISON IN HIS DEPOSITION SUGGESTED
4 BECAUSE THE LINE WAS BLANK IN THE FIRST ITERATION THAT, OH, I
5 SUPPOSE DR. STEWART DIDN'T HAVE ENOUGH INFORMATION TO MAKE A
6 CALCULATION. SO, HE'S RENDERING AN OPINION ON SPECIFIC
7 CAUSATION IN THIS CASE ERRONEOUSLY THINKING THAT EXPOSURES
8 ARE ATTRIBUTABLE TO YAMAHA THAT AREN'T. AND THOSE EXPOSURES
9 ARE AS MUCH AS 83.7 PERCENT OF THE TOTAL.

10 GO BACK TO THE PREVIOUS SLIDE. DR. HARRISON ALSO FAILED
11 TO RULE OUT PCB'S. DR. HARRISON HAS TESTIFIED MANY TIMES
12 THAT PCB'S CAUSE NHL. THERE ARE A SERIES OF PCB CASES HE'S
13 AN EXPERT IN. AND HE WAS ASKED, HAVE YOU RULED OUT PCB'S AS
14 THE CAUSE OF MR. BOYKIN'S NON-HODGKIN'S LYMPHOMA? HIS ANSWER
15 WAS, I WAS NOT ABLE TO. HE ALSO FAILED TO RULE OUT GASOLINE
16 EXPOSURES. THERE'S NO GASOLINE DEFENDANT IN THIS CASE. NO
17 GASOLINE SUPPLIER WAS SUED.

18 AND IMPORTANTLY DR. STEWART IN HIS REPORT NOTED THAT
19 GASOLINE EXPOSURES WERE REPORTED TO BE THE MOST COMMON
20 EXPOSURE. AND WE HAVE SEEN HOW MUCH BENZENE IS IN GASOLINE
21 AS COMPARED TO MINERAL SPIRITS.

22 HARRISON TESTIFIED, MY ONLY OPINION WOULD BE THAT
23 GASOLINE, WHICH DOES CONTAIN VERY SMALL AMOUNTS OF BENZENE
24 WOULD, COULD ALSO HAVE ADDED TO HIS CUMULATIVE EXPOSURE OVER
25 THE YEARS AS A MECHANIC. HARRISON ALSO FAILED TO RULE OUT

1 PERSONAL HOME GARAGE EXPOSURES. THE ENTIRE TIME MR. BOYKIN
2 WAS WORKING AT YAMAHA AS A MOTORCYCLE MECHANIC HE WAS ALSO
3 DOING HOME GARAGE WORK ON MOTORBIKES, ET CETERA, AND HE'D
4 BEEN DOING THAT FOR A WHILE.

5 DR. HARRISON TESTIFIED HE UNDOUBTEDLY HAD HOME EXPOSURE
6 DOING MOTORCYCLE WORK IN HIS HOME GARAGE. AND HE ALSO FAILED
7 TO RULE OUT BACKGROUND EXPOSURES. THIS IS IMPORTANT WHEN WE
8 GET TO THE NO SAFE THRESHOLD STUFF LATER. DR. HARRISON WAS
9 ASKED IF HE -- AND IT WAS REFERRING TO MR -- IT WAS A
10 HYPOTHETICAL QUESTION ABOUT AN INDIVIDUAL. SORRY. NO, IT'S
11 ABOUT MR. BOYKIN. THE QUESTION IS, IF HE CAME TO ME OR HIS
12 FAMILY CAME TO ME AND SAID, DR. HARRISON, WHAT DO YOU THINK?
13 DID MR. BOYKIN GET NHL FROM JUST ANY BACKGROUND EXPOSURE TO
14 BENZENE, I'D SAY, QUOTE, I WOULDN'T KNOW, I COULDN'T TELL
15 YOU. YOU COULDN'T RULE IT OUT; COULD YOU? I COULDN'T RULE
16 IT OUT. SO EVEN THE BENZENE IN BACKGROUND AIR DR. HARRISON
17 COULDN'T RULE OUT. TWO SLIDES FORWARD.

18 AND HERE'S THE QUESTION AND ANSWER ON HIS MAJOR ERROR IN
19 TERMS OF EXPOSURE WHILE MR. BOYKIN WAS WORKING AS A MECHANIC.
20 THE QUESTION WAS, SO IS IT YOUR UNDERSTANDING OF DR.
21 STEWART'S REPORT THAT HIS CUMULATIVE DOSE OPINION AS FAR AS
22 EXPRESSED IN TABLE TWO, PAGE 23, IS -- WHICH SAYS UNDER
23 SUMMARY OF CUMULATIVE EXPOSURES TO PHILIP BOYKIN, QUOTE,
24 TOTAL PPM YEARS RANGE LOW OF 25.2, HIGH OF 133.8, THAT
25 THIS -- THAT THIS IS HIS OPINION RELATIVE SOLELY TO HIS WORK

1 AS A MECHANIC? AND THE ANSWER WAS, CORRECT.

2 NEXT SLIDE. THIS SLIDE JUST SORT OF CREATES A TIMELINE
3 JUST TO SORT OF SEE WHAT WE ARE TALKING ABOUT HERE. ONE
4 THING THAT'S MISSING ON THE SLIDE IS YOU WILL SEE THAT
5 JULY 22ND, 2009 MR. BOYKIN PASSED. HE WAS DIAGNOSED PRIOR TO
6 THAT. BUT IN 2000 HE HAD IMAGING DONE AT A HOSPITAL. DR.
7 HARRISON WAS ASKED ABOUT IT. AND DR. HARRISON TESTIFIED, AND
8 I THINK WE WILL SEE IT ON A SLIDE HERE MOMENTARILY, THAT MORE
9 LIKELY THAN NOT HIS LYMPHOMA WAS PRESENT, ALREADY THERE IN
10 2000.

11 IN FACT, HE HAD -- HE TESTIFIED THAT IT WOULD BE
12 EXTRAORDINARILY UNLIKELY TO SEE THE SAME TYPE OF UNDERLYING
13 LYMPHOMA CHARACTERISTICS IN 2000 AND THEN HAVE AN INDIVIDUAL
14 DIAGNOSED IN 2009 WITH THAT TYPE OF NON-HODGKIN'S LYMPHOMA
15 AND FOR IT TO BE TWO SEPARATE DISEASES WITH SEPARATE CAUSES.

16 SO, IF WE TAKE 2000 AND BACK-TRACK TO 1960, WHICH IS 40
17 YEARS, THAT'S -- THAT'S THE WINDOW WE ARE LOOKING AT. AND
18 YOU WILL SEE THERE IS A REFERENCE TO DR. HARRISON TESTIFYING
19 THAT THE LATENCY PERIOD, WHICH IS HOW LONG THE EXPOSURES CAN
20 GO ON BEFORE YOU GET -- IT'S TIME FROM FIRST EXPOSURE TO
21 ONSET OF THE DISEASE COULD BE AS LONG AS 40 YEARS. YOU WILL
22 SEE IN THAT TIME PERIOD OF 1973 TO 1979 HE'S GETTING UP TO
23 83.7 PERCENT OF HIS BENZENE EXPOSURES DURING THAT SHORT TIME
24 PERIOD WHEN MR. BOYKIN WAS A PRINTING PRESS OPERATOR.

25 FROM '81 TO 2009 MR. BOYKIN WORKED AS A MOTORCYCLE

1 MECHANIC, MOST COMMON EXPOSURE WAS GASOLINE. WE, SAFETY
2 KLEEN, WAS INVOLVED MID-80'S TILL -- WELL, WE ARE BEING
3 GENEROUS HERE. IT WAS PROBABLY 2003, BUT NONETHELESS, IN
4 THAT TIME PERIOD, AND THERE ARE A WHOLE HOST OF RISK FACTORS
5 THAT DR. HARRISON HAS TESTIFIED AND ADMITTED HE CAN'T RULE
6 OUT.

7 NEXT SLIDE, PLEASE. THIS I DON'T WANT TO SPEND TOO MUCH
8 TIME ON, BUT IT'S JUST -- IT'S AN IMPORTANT CONSIDERATION
9 GIVEN DR. HARRISON'S POSITION WITH REGARDING SPECIFIC
10 CAUSATION AND GIVEN HIS LONG LATENCY TESTIMONY. DR.
11 HARRISON'S PREVIOUSLY TESTIFIED THAT DISEASES LIKE NHL AND
12 MULTIPLE MYELOMA ARE MONOCLONAL DISEASES. BASICALLY YOU HAVE
13 A CELL THAT GOES HAYWIRE, FLIPS, AND IT'S THE START OF THE
14 CANCER DEVELOPMENT.

15 AND HERE IS WHAT HE'S TESTIFIED TO IN THE PAST. HE'S
16 TESTIFIED THAT NHL IS A MONOCLONAL DISEASE AND HE'S -- HE'S
17 AGREED THAT A SINGLE CELL BECOMES MALIGNANT, THEN GROWS OVER
18 TIME, AND THAT'S WHAT BASICALLY MONOCLONAL MEANS. HE SAYS
19 CORRECT.

20 IN ANOTHER CASE, NOT THIS CASE -- ALTHOUGH HE HAD
21 TROUBLE WITH THE QUESTION IN THIS CASE -- IN ANOTHER CASE HE
22 TESTIFIED AS FOLLOWS. THE QUESTION WAS, CAN WE AGREE THAT
23 EXPOSURES OCCURRING AFTER THAT MALIGNANT TRANSFORMATION
24 OCCURRED ARE NOT RELEVANT TO THE CAUSE OF THE DISEASE? AND
25 HIS TESTIMONY WAS IN ABOUT -- I THINK IT'S THERE -- IT WAS IN

1 2010. IT WASN'T THAT LONG AGO. AND HIS ANSWER WAS,
2 PROBABLY, I WOULD AGREE.

3 NOW, IN THIS CASE HE WAS ASKED ABOUT IT ON DAY ONE OF
4 HIS DEPOSITION. HE WAS KIND OF CAUGHT LIKE A DEER IN THE
5 HEADLIGHTS AND COUNSEL GAVE HIM A TIME-OUT ON IT. BUT THE
6 POINT HERE IS FIRST THAT IT'S FURTHER UNDERMINING HIS
7 CREDIBILITY AND RELIABILITY. BUT SECONDLY, WE HAVE A
8 SITUATION WHERE ACCORDING TO DR. HARRISON YOU HAVE CAUSATIVE
9 EXPOSURES AS EARLY AS 1960, YOU HAVE GOT THESE MASSIVE
10 PRISTINE EXPOSURES IN THE 1970'S, AND THEN ALL OF THE
11 DEFENDANTS IN THIS CASE DON'T EVEN GET INVOLVED UNTIL THE MID
12 TO LATE 1980'S. AND HE'S TESTIFIED BEFORE THAT WHEN YOU HAVE
13 EXPOSURES AFTER THE MALIGNANT TRANSFORMATION, THEY ARE NOT
14 RELEVANT. THAT'S AN IMPORTANT CONSIDERATION.

15 WE TALKED A LITTLE BIT EARLIER ABOUT DR. HARRISON'S NEW
16 AFFIDAVIT BEING A MOVING TARGET WHICH FURTHER UNDERMINES HIS
17 RELIABILITY. FROM MY STANDPOINT IN TERMS OF THE RELIABILITY
18 QUESTION, YOU KNOW, WHETHER OR NOT THAT NEW AFFIDAVIT COMES
19 IN, ONE THING IS CLEAR UNDER EITHER SCENARIO; FURTHER
20 UNDERMINES HIS RELIABILITY. I MEAN, THE MERE FACT THAT HE'S
21 DOING IT, AND WE HAVE SEEN THE CASE LAW THAT TALKS ABOUT THE
22 IMPROPRIETY OF DOING THAT IN RESPONSE TO AN ATTACK -- IS
23 FURTHER EVIDENCE OF HIS UNRELIABILITY.

24 AND HE -- AND COUNSEL HAS ALREADY ACKNOWLEDGED THAT THE
25 PURPOSE OF IT WAS TO RESPOND TO VARIOUS CRITICISMS. AND WE

1 WILL SEE HERE IN THE BAUSCH AND LOMB CASE THE COURT HAS RULED
2 THAT AN EXPERT'S WILLINGNESS TO ABANDON OR QUALIFY OPINIONS
3 INCLUDING WHEN FACED WITH A DAUBERT CHALLENGE UNDERMINES THE
4 RELIABILITY OF HIS OR HER OPINIONS. NEXT SLIDE, PLEASE.

5 ALL RIGHT. SO, DR. HARRISON CLAIMS HE REVIEWED MANY
6 STUDIES EVALUATING THE RISK OF NHL WITH EXPOSURE TO MINERAL
7 SPIRITS. HIS REPORT VERY CLEARLY FOCUSED ON ONE QUESTION AND
8 ONE QUESTION ALONE, AND THAT IS WHETHER OR NOT BENZENE CAN
9 CAUSE NHL. HE DOESN'T CITE ANY STUDIES IN HIS REPORT LET
10 ALONE ANY STUDIES THAT INVOLVE MINERAL SPIRITS. AND IN FACT,
11 EVEN WHEN FACED WITH THIS DAUBERT CHALLENGE AND EVEN IN THE
12 WAKE OF HIM CREATING A NEW AFFIDAVIT, THEY STILL ONLY COME
13 FORWARD WITH A FEW STUDIES WHICH THEY CLAIM OR WE'LL HEAR ANY
14 WAY ARE MINERAL SPIRITS.

15 WELL, THEY ARE NOT FIRST AND FOREMOST, A. AND B, EVEN
16 IF THEY WERE, AGAIN, BEFORE WE'RE GETTING INTO SORT OF THE
17 TRUTH OF THE MATTER ASSERTED, IT'S THE FACT THAT HE DIDN'T
18 EVEN LOOK AT IT. THAT'S THE NUMBER ONE PROBLEM. NUMBER TWO,
19 EVEN IF THERE WERE STUDIES ABOUT MINERAL SPIRITS, WHICH THERE
20 ARE NOT -- AND THEY WERE STATISTICALLY SIGNIFICANT, FOUR,
21 FIVE, SIX OUT OF A HUNDRED? HE'S -- THERE'S NO EVIDENCE IN
22 HERE HOW MANY STUDIES THERE ARE ON MINERAL SPIRITS. AND HE'S
23 CLEARLY FAILED TO APPLY HIS OWN CRITERIA, THE BRADFORD HILL
24 CRITERIA. HE HAS NO IDEA ABOUT THE REPRODUCIBILITY OF THE
25 FINDINGS. AND WE KNOW HE DOESN'T KNOW ANYTHING ABOUT THE

1 STRENGTH OF ASSOCIATION IN ANY OF THOSE STUDIES.

2 AS MENTIONED EARLIER AND CITED IN SOME OF THIS DAUBERT
3 CASE LAW INCLUDING THIS MITCHELL VERSUS GENCORP CASE, WHEN
4 YOU FORM YOUR OPINIONS AND THEN AFTERWARDS YOU GO LOOKING FOR
5 SUPPORT, THAT'S THE ANTITHESIS OF THE SCIENTIFIC METHOD AND
6 IT'S UNRELIABLE.

7 AND ONE POINT JUST TO NOTE -- IT'S NOT ALL THAT TERRIBLY
8 IMPORTANT, BUT IT WAS INTERESTING JUST IN TERMS OF SOME OF
9 THE NEW STUFF COMING OUT IN HIS AFFIDAVIT. FOR THE FIRST
10 TIME EVER WE SEE HIM USING A REFERENCE TO FREQUENT, REGULAR
11 AND PROXIMATE EXPOSURES TO BENZENE FROM SAFETY KLEEN
12 PRODUCTS, AND THAT'S NOT SOMETHING HE TALKED ABOUT BEFORE.
13 HE JUST TALKED ABOUT THE WEIGHT OF THE EVIDENCE BEFORE, AND
14 IN FACT THAT'S AN ASBESTOS STANDARD THAT'S NOT APPLICABLE
15 HERE.

16 SO, THE NO SAFE THRESHOLD THEORY IS ONE THAT'S BEEN
17 REJECTED BY THE COURTS. AND HIS ENTIRE APPROACH IN THIS CASE
18 AND HIS ENTIRE APPROACH WITH RESPECT TO HIS NEW OPINIONS IN
19 HIS AFFIDAVIT, YOU KNOW, BASICALLY THE NEW OPINION ON THIS
20 FRONT IS, WELL, I DON'T HAVE TO WORRY ABOUT IDIOPATHIC
21 BECAUSE ONCE I RULE IT IN, IT DOESN'T MATTER, I'M ALLOWED TO
22 RULE EVERYTHING IN, I DON'T HAVE TO RULE ANYTHING OUT. THOSE
23 ARE NEW OPINIONS, BUT THEY'RE PREDICATED ON THE NO SAFE
24 THRESHOLD THEORY WHICH HAS BEEN ROUNDLY REJECTED BY THE
25 COURTS THAT HAVE LOOKED AT IT AND IT'S ALSO BEEN REJECTED IN

1 CASES WHERE PEOPLE -- WHERE EXPERTS ARE TRYING TO DO OR USE A
2 DIFFERENTIAL DIAGNOSIS.

3 WE WILL SEE, FOR EXAMPLE, HERE THE HENRICKSEN VERSUS
4 CONOCOPHILLIPS CASE. THE COURT THERE EXCLUDED TESTIMONY OF
5 AN EXPERT WHO OPINED THAT WHEN NO SAFE THRESHOLD OF EXPOSURE
6 TO A CARCINOGEN HAS BEEN ESTABLISHED, EACH AND EVERY EXPOSURE
7 WILL INCREASE THE DEVELOPMENT OF CANCER AS UNRELIABLE
8 METHODOLOGY.

9 ONE THING I WILL NOTE ON THIS LINE IS JUST THE VERY
10 BOTTOM POINT. IT'S A CITE TO A CASE CALLED BAKER VERSUS
11 CHEVRON. IN THAT CASE THEY ALSO ADDRESS THE ISSUE AND THEY
12 NOTED THAT, QUOTE, SINCE BENZENE IS UBIQUITOUS, CAUSATION
13 UNDER THE ONE-HIT THEORY, WHICH IS ALSO KNOWN AS THE NO
14 THRESHOLD THEORY, COULD NOT BE ESTABLISHED BECAUSE IT WOULD
15 BE JUST AS LIKELY THAT AMBIENT BENZENE WAS THE CAUSE OF
16 PLAINTIFF'S ILLNESS.

17 NEXT SLIDE. AGAIN, IN THIS CASE, YES, IARC HAS NOT
18 CONCLUDED THAT BENZENE CAUSES NHL AND MOST OF THE STUDIES
19 HAVE BEEN NEGATIVE. YES, OF THE RECENT META-ANALYSIS OF
20 WHICH STEINMAUS IS ONE, THEY HAVE FOUND NO STATISTICALLY
21 SIGNIFICANT ASSOCIATION. THAT'S WITH RESPECT TO BENZENE AND
22 NHL. BUT AGAIN, HE DIDN'T APPLY HIS OWN CRITERIA ON THAT
23 FRONT AND HE HASN'T ESTABLISHED REPRODUCIBILITY OF FINDINGS
24 AND STATISTICAL SIGNIFICANCE.

25 BACKING UP TO THE MORE IMPORTANT QUESTION, HE DIDN'T DO

1 ANYTHING WITH RESPECT TO MINERAL SPIRITS. HE DIDN'T EVEN
2 CONSIDER THE AUTHORITATIVE AGENCIES THAT HE OFTEN RELIES ON
3 AND WHAT THEY FOUND EVEN THOUGH HE ACKNOWLEDGED THAT THEY
4 HAVE LOOKED AT IT. HE DIDN'T CONSIDER ALL THE
5 EPIDEMIOLOGICAL LITERATURE OUT THERE. HE'S MADE NO EFFORT IN
6 THIS CASE TO DEMONSTRATE WHY IT'S ALL RIGHT TO DO THAT AND
7 RENDER HIS OPINION WITH RESPECT TO US. AND WE HAVE SEEN THE
8 CASE LAW MADE CLEAR THAT JUST SAYING IT CONTAINS BENZENE IS
9 NOT ENOUGH.

10 HERE'S SOME OF THE THINGS THAT HARRISON DIDN'T KNOW.
11 AGAIN, HE DIDN'T KNOW WHAT IARC SAYS OR ANY OF THE LITERATURE
12 ABOUT MINERAL SPIRITS. HE DIDN'T KNOW WHAT PERCENTAGE OF
13 STUDIES FOR BENZENE IN NHL WERE STATISTICALLY SIGNIFICANT.
14 HE DIDN'T EVEN KNOW WHETHER OR NOT THAT WAS MORE THAN HALF.
15 HE WAS ASKED ABOUT POSITIVE FINDINGS. SAME THING. HE DIDN'T
16 KNOW.

17 HE DIDN'T KNOW ABOUT ANY STUDIES THAT HAD A GREATER THAN
18 2.0. AND HE DIDN'T KNOW IF ALTERNATE EXPOSURES, OF WHICH
19 THERE ARE MANY INCLUDING SOME THAT HAVE NOTHING TO DO WITH
20 BENZENE -- PCP HAS NOTHING TO DO WITH BENZENE. A LOT OF THE
21 EXPOSURES IN THE PRINTING INDUSTRY HAVE NOTHING TO DO WITH
22 BENZENE. HE COULDN'T RULE THEM OUT AND HE COULDN'T EVEN RULE
23 OUT ONE OF THEM AT LEAST AS A SOLE CAUSE.

24 IN THE BURST CASE DR. HARRISON APPROACHED IT THE SAME
25 WAY CLAIMING THAT THE WEIGHT OF THE EVIDENCE SUPPORTS A

1 CAUSAL RELATIONSHIP BETWEEN AML AND BENZENE. AGAIN, HE
2 DIDN'T LOOK AT THE RIGHT SUBSTANCE. THE COURT KICKED HIM TO
3 THE CURB ON THAT AND SAID IT'S NOT RELEVANT, YOU FAILED THE
4 GENERAL CAUSATION TEST.

5 NEXT SLIDE, PLEASE. HERE IS WHERE THE COURT STATES
6 THAT, QUOTE, THE SIMPLE EXPLANATION THAT GASOLINE CONTAINS
7 BENZENE AND BENZENE IS A KNOWN CARCINOGEN CANNOT BE
8 JUSTIFICATION FOR SUCH EXTRAPOLATION. THEY NOTED WHAT THOSE
9 AGENCIES FOUND ABOUT GASOLINE. AND IN -- JUST LIKE IN THIS
10 CASE, HARRISON MADE THE OMNIBUS STATEMENT THAT HE REVIEWED
11 THE LITERATURE BUT AT DEPOSITION COULD NOT IDENTIFY ANY
12 STUDIES SHOWING AML RISK FROM GASOLINE EXPOSURE.

13 THAT'S EXACTLY WHAT HAPPENED HERE. HE CLAIMS TO HAVE
14 DONE THIS BUT HE COULDN'T ANSWER THE QUESTIONS. AND HIS
15 REPORT IS NOT SPECIFIC EXCEPT FOR GENERALLY REFERENCING THAT
16 EIGHT-YEAR-OLD DECLARATION.

17 AND THE COURT IN BURST IMPORTANTLY NOTED THAT EVEN IF HE
18 HAD CITED GASOLINE SPECIFIC STUDIES, HE DIDN'T SHOW AND HIS
19 REPORT DOESN'T SHOW THAT HE APPLIED THE BRADFORD HILL
20 CRITERIA AND HIS OWN CRITERIA TO THOSE STUDIES, SO HE WOULD
21 STILL HAVE FAILED THE GENERAL CAUSATION INQUIRY.

22 YOUR HONOR, AT THIS POINT I'M GOING TO LET COUNSEL
23 SPEAK. THANK YOU.

24 THE COURT: THANK YOU. OKAY. WHO IS NEXT? IS
25 THIS THE END OF THIS -- OF THE ARGUMENT ON THE GENERAL

1 CAUSATION? SO, I GUESS THERE'S THE ARGUMENT BY ACUITY ON
2 SPECIFIC CAUSATION OR DOES THE PLAINTIFF WISH TO RESPOND TO
3 GENERAL CAUSATION FIRST?

4 MR. JENSEN: I THINK THERE WERE A BUNCH OF SPECIFIC
5 CAUSATION WRAPPED UP INTO MR. MCGOLDRICK'S ARGUMENT. SO, IF
6 SOMEBODY ELSE WANTS TO TALK ABOUT DR. HARRISON, I THINK THAT
7 MAKES SENSE BEFORE I STAND UP.

8 MR. MCGOLDRICK: YES, YOUR HONOR. I WENT THROUGH
9 SPECIFICS AS WELL, SO...

10 THE COURT: SURE. WOULD YOU LIKE TO RESPOND,
11 MRS. BONNEVILLE?

12 MRS. BONNEVILLE: I JUST HAVE A FEW COMMENTS. MR.
13 MCGOLDRICK DID AN EXCELLENT JOB. I'M JENNIFER BONNEVILLE ON
14 BEHALF OF ACUITY SPECIALTY PRODUCTS. BEL-RAY ALSO JOINED IN
15 THAT MOTION. AND JUST FOR THE COURT'S REFERENCE, BECAUSE THE
16 MOTIONS ARE DIFFERENT, THE DOCKET NUMBER FOR OUR MOTION IS
17 286.

18 THE COURT: SO I GUESS JUST TO CLARIFY FOR ME AND
19 FOR THE COURT STAFF, WE HAVE STILL PENDING AS A MOTION NUMBER
20 287, WHICH I THINK BEL-RAY JOINED IN. I THINK IT WAS MAYBE
21 YAMAHA'S ORIGINALLY? AND IT INDICATED THAT BEL-RAY JOINED
22 IN. BUT SHOULD WE TERMINATE THAT MOTION AS--

23 MRS. BONNEVILLE: MY UNDERSTANDING IS THAT MOTION
24 IS NO LONGER IN PLAY.

25 MRS. WAGNER: THAT'S CORRECT.

1 THE COURT: OKAY. ANY OBJECTION FROM THE
2 PLAINTIFF?

3 MR. JENSEN: NO, I WOULDN'T OBJECT, YOUR HONOR.

4 THE COURT: OKAY. WELL THEN, I WILL DEEM MOOT
5 MOTION NUMBER 287, WHICH WILL STRIKE THAT FROM THE PENDING
6 MOTIONS LIST. OKAY. PLEASE PROCEED.

7 MRS. BONNEVILLE: THANK YOU, YOUR HONOR. SO I
8 CERTAINLY DON'T WANT TO REITERATE WHAT MR. MCGOLDRICK SO
9 APTLY EXPLAINED. I JUST WANT TO HIGHLIGHT A COUPLE OF
10 POINTS. SO WHEN YOU TAKE A STEP BACK FROM HARRISON AND WE
11 TAKE A STEP BACK FROM STEWART AND WE LOOK AT THE ISSUE OF
12 CAUSATION, THERE'S TWO QUESTIONS THAT PLAINTIFFS HAVE THE
13 BURDEN OF ANSWERING.

14 THE FIRST IS THE GENERAL CAUSATION WHICH MR. MCGOLDRICK
15 DISCUSSED IN DETAIL. THAT'S THE CAN-IT QUESTION. IS IT
16 POSSIBLE. ACUITY IS NOT, FOR THE PURPOSES OF THEIR MOTION,
17 CHALLENGING THAT. AT THE TIME OF TRIAL SHOULD WE GET THERE,
18 IT'S A WHOLE DIFFERENT STORY. BUT FOR THE PURPOSES OF THIS
19 MOTION, WE ARE ONLY FOCUSING ON THE SECOND PIECE. THIS IS
20 THE SPECIFIC CAUSATION PIECE. THIS IS THE WHO-DID-IT
21 QUESTION. AND THAT'S THE SOLE FOCUS OF OUR MOTION. THAT IS
22 THE QUESTION THAT WE ARE LOOKING AT.

23 NOW LET'S BE CLEAR, BECAUSE THERE'S A LOT OF THINGS IN
24 PLAINTIFF'S OPPOSITION. WE ARE NOT QUESTIONING FOR THE
25 PURPOSE OF OUR MOTION DR. STEWART -- DR. HARRISON'S

1 QUALIFICATIONS. WE ARE NOT CHALLENGING THE DIFFERENTIAL
2 ETIOLOGY OR DIFFERENTIAL DIAGNOSIS METHODOLOGY. WHAT WE ARE
3 CHALLENGING IS HOW DR. HARRISON TOOK THAT TOOL AND MISAPPLIED
4 IT BECAUSE REALLY THAT'S WHAT WE ARE LOOKING AT. THIS IS A
5 TOOL.

6 SO TO GIVE AN EXAMPLE THAT I HAVE SEEN IN SOME OF THE
7 CASE LAW, TOOL -- YOU KNOW, THESE TYPE OF TOOLS, THESE ARE
8 LIKE A SCALPEL. YOU GIVE A SCALPEL TO A TRAINED SURGEON,
9 IT'S AN EFFECTIVE TOOL. YOU GIVE A SCALPEL TO MY
10 THREE-AND-A-HALF YEAR OLD SON, IT'S A WEAPON. IT'S A TOTALLY
11 DIFFERENT THING. SO WE ARE NOT ARGUING THAT DIFFERENTIAL
12 DIAGNOSIS IS NOT AN APPROPRIATE METHODOLOGY IN SOME
13 SITUATIONS.

14 WHAT WE ARE SAYING IS WHEN YOU LOOK AT WHAT DR. HARRISON
15 DID, HE DIDN'T USE THE TOOL PROPERLY. IT WAS A WEAPON, NOT A
16 TOOL. AND WHY DO WE SAY THAT? TWO REASONS. THERE ARE TWO
17 STEPS INVOLVED IN DOING THE METHODOLOGY. YOU HAVE TO RULE IT
18 IN, WHICH MEANS YOU CONSIDERED IT, AND THEN YOU HAVE TO RULE
19 IT OUT. BUT YOU CAN'T SAY, I RULED IT OUT WHEN YOU NEVER
20 CONSIDERED IT IN THE FIRST PLACE. AND THAT'S ONE OF THE
21 FUNDAMENTAL PROBLEMS WITH DR. HARRISON.

22 DR. HARRISON'S REPORT ON PAGE 10, IT'S NUMBER FIVE OF
23 HIS OPINION SAYS, I HAVE CONSIDERED OTHER CAUSES OF NHL, AND
24 HE GOES THROUGH A COUPLE OF THESE -- OF DIFFERENT ONES;
25 SMOKING, FAMILY HISTORY, OBESITY, RADIATION, CHEMOTHERAPY,

1 AND THEN HE COMES TO HIS CONCLUSION.

2 WE GO TO TAKE DR. HARRISON'S DEPOSITION AND DR. HARRISON
3 ADMITS TO US, YOU KNOW WHAT, I DIDN'T IDENTIFY ALL THE
4 POTENTIAL CAUSES IN MY REPORT, I DIDN'T TELL YOU THAT. AND
5 SO HE GIVES US A DIFFERENT LIST AT THE TIME OF HIS
6 DEPOSITION. AND WE GO THROUGH AND WE ASK HIM ABOUT THAT
7 LIST. IS THAT ALL THERE IS? YES.

8 WELL, THEN WE ASK HIM ABOUT PCB. OH YEAH, YOU'RE RIGHT,
9 PCB. THEN WE BRING THE MOTION, WE GET TO THE AFFIDAVIT, AND
10 DR. HARRISON GIVES US AN AFFIDAVIT THAT SAYS NO, IGNORE WHAT
11 I WROTE IN MY FIRST REPORT, IGNORE WHAT I SAID AT MY DEPO, I
12 CONSIDERED -- AND I THINK THE WORD HE USES -- THIS IS DOCKET
13 308-1, THIS IS HIS AFFIDAVIT AT PAGE 10 -- I HAVE CONSIDERED
14 THE EXTENT TO WHICH ANY OF THE KNOWN RISK FACTORS MAY HAVE
15 CONTRIBUTED. WELL, THAT'S NOT WHAT YOU TOLD US BEFORE.

16 SO YOU DIDN'T RULE THEM IN, SO YOU DIDN'T CONSIDER THEM,
17 HOW CAN YOU RULE THEM OUT? WELL, LET'S LOOK AT WHAT'S LEFT.
18 WHEN WE GET THE REPORT DR. HARRISON'S OPINION IS OCCUPATIONAL
19 BENZENE EXPOSURE IS A SUBSTANTIAL FACTOR, THAT'S IT, THAT'S
20 WHAT CAUSED IT, THIS IS MY OPINION.

21 WE GET THE AFFIDAVIT. WELL, BENZENE IS A SUBSTANTIAL
22 FACTOR BUT SO ARE PCB'S. OKAY. WELL, LET'S SEE WHAT ELSE
23 ARE WE LEFT WITH? SO WE'VE GOT BENZENE, WE'VE GOT PCB'S, WE
24 HAVE GOT IDIOPATHIC BECAUSE DR. HARRISON SAYS THAT A MAJORITY
25 OF NHL IS IDIOPATHIC, WE HAVE GOT THE PRINTING PRESS

1 EXPOSURE, WE'VE GOT THE HOME EXPOSURE, AND WE'VE GOT THE
2 BACKGROUND EXPOSURE.

3 IF IDIOPATHIC IS MORE THAN 51 PERCENT, DR. HARRISON TOLD
4 US IN HIS DEPOSITION THAT THERE'S A 25 PERCENT CHANCE THAT
5 PCB'S WERE A SUBSTANTIAL FACTOR. WHAT'S LEFT TO GET US TO A
6 SUBSTANTIAL FACTOR? A 10 PERCENT CHANCE? A 5 PERCENT
7 CHANCE?

8 WHEN WESTBERRY AND ALL THE OTHER COURTS AND THE CASES
9 THAT WE CITE, WHEN THEY HAVE SAID DIFFERENTIAL DIAGNOSIS IS
10 AN APPROPRIATE TOOL, THEY WERE VERY CAREFUL IN IT'S AN
11 APPROPRIATE TOOL WHEN IT'S USED APPROPRIATELY. SO WESTBERRY
12 TALKS ABOUT SERIOUS CONSIDERATION. SERIOUSLY CONSIDERING.
13 SERIOUSLY CONSIDER WHEN YOU RULE IT IN AND SERIOUSLY
14 CONSIDERING WHEN YOU RULE IT OUT. AND THAT'S WHAT WE ARE
15 LEFT WITH.

16 IT WASN'T SERIOUSLY CONSIDERED. THE METHODOLOGY, IF
17 DONE PROPERLY, IS GREAT, BUT THAT'S NOT WHAT WAS DONE HERE AT
18 ALL.

19 *THE COURT:* THANK YOU VERY MUCH. VERY WELL. ANY
20 FOLLOW-UP ON THE CHALLENGES TO GENERAL OR SPECIFIC CAUSATION?
21 ANYONE ELSE? ALL RIGHT.

22 *MR. JENSEN:* YOUR HONOR, MAY WE TAKE ANOTHER FIVE
23 MINUTE BREAK SO THAT I CAN--

24 *THE COURT:* SURE. IT ACTUALLY HITS US AT A GOOD
25 TIME. WHY DON'T WE GO AHEAD AND TAKE OUR AFTERNOON BREAK

1 NOW. WE CAN TAKE A BREAK A LITTLE BIT LONGER, MAYBE 10
2 MINUTES OR 15 MINUTES, AND THEN WE WILL RESUME BACK WITH
3 THOSE ARGUMENTS. I THINK WE ARE MAKING GOOD TIME. SO FAR SO
4 GOOD. SO, VERY GOOD. THANK YOU. WE WILL BE IN RECESS.

5 (WHEREUPON, A BRIEF RECESS WAS HAD.)

6 THE COURT: THANK YOU VERY MUCH. I WILL CALL ON
7 MR. JENSEN TO ADDRESS THE MOTION TO STRIKE, MOTIONS TO STRIKE
8 DR. HARRISON'S OPINIONS FROM THE RECORD.

9 MR. JENSEN: VERY GOOD, YOUR HONOR. I WANT TO
10 START BY JUST DISCUSSING, TALKING WITH YOU A BIT JUST AS AN
11 OVERVIEW ABOUT THE LEGAL RESPONSIBILITIES OF THE COURT IN THE
12 CONTEXT OF DAUBERT AND RULE 702 AND WHAT THE COURT'S
13 DISCRETION EXTENDS TO DO AND WHAT THE COURT'S DISCRETION DOES
14 NOT EXTEND TO.

15 AND I THINK THAT IN TALKING ABOUT THAT, JUSTICE BREYER
16 WRITES AN INTRODUCTION THAT'S CONTAINED IN THE REFERENCE
17 MANUAL ON SCIENTIFIC EVIDENCE. AND HE GIVES THIS -- HE MAKES
18 THIS STATEMENT. THE SEARCH IS NOT A SEARCH FOR SCIENTIFIC
19 PRECISION. A JUDGE IS NOT A SCIENTIST AND A COURTROOM IS NOT
20 A SCIENTIFIC LABORATORY. BUT CONSIDER THE REMARK MADE BY THE
21 PHYSICIST WOLFGANG PAULI. AFTER A COLLEAGUE ASKED WHETHER A
22 CERTAIN SCIENTIFIC PAPER WAS WRONG, PAULI REPLIED, THAT PAPER
23 ISN'T EVEN GOOD ENOUGH TO BE WRONG. OUR OBJECTIVE IS TO
24 AVOID LEGAL DECISIONS THAT REFLECT THAT PAPER'S SO-CALLED
25 SCIENCE.

1 AND YOU KNOW, I THINK WHAT JUSTICE BREYER IS GETTING AT
2 HERE, YOUR HONOR, IS THAT WHEN TWO SIDES HAVE A DEBATE WHERE
3 THEY EACH PRESENT EXPERT TESTIMONY, YOU KNOW, WITH ADVOCATES
4 BEING WHO THEY ARE, THERE'S ALWAYS GOING TO BE A SIGNIFICANT
5 CONFLICT. AND THE ROLE OF THE COURT IN ASSESSING THE
6 LIABILITY UNDER RULE 702 DOES NOT EXTEND TO MAKING A DECISION
7 TO EXCLUDE AN EXPERT BECAUSE THAT YOU DECIDED THAT THAT
8 EXPERT'S CONCLUSIONS ARE WRONG AND THAT THE OTHER SIDE'S
9 EXPERT IS RIGHT.

10 YOU'RE LOOKING AT SOMETHING QUITE DIFFERENT AND A MUCH
11 EASIER HURDLE FOR THE EXPERT TO OVERCOME, WHICH IS HAS
12 THAT -- HAS THAT EXPERT APPLIED A METHODOLOGY, WHETHER THEIR
13 CONCLUSIONS FROM THAT METHODOLOGY AND ULTIMATELY THEIR
14 INFERENCES IN THE USE OF, YOU KNOW, THE JUDGMENT CALL THAT
15 THEY HAVE MADE AFTER APPLYING THAT METHODOLOGY WITH RESPECT
16 TO THE CONCLUSION IS CORRECT OR NOT IS THE METHOD ONE THAT
17 GIVEN THE FACTS OF THE CASE AND THE CONTEXT IN WHICH THE WORK
18 WAS DONE IS ONE THAT WAS AN APPROPRIATE SCIENTIFICALLY-VALID
19 RELIABLE METHOD.

20 AND THOSE -- THAT IS A DISTINCTION WHICH, YOU KNOW, IN
21 SOME WAYS IT -- IT CAN BE DESCRIBED AS A BRIGHT LINE AND SOME
22 WAYS IT MIGHT BE EASY TO SAY. BUT I FIND IN MY EXPERIENCE
23 ARGUING THESE TYPES OF MOTIONS THAT IT IS A DIFFICULT -- JUST
24 FROM A HUMAN NATURE STANDPOINT IT IS A VERY DIFFICULT
25 RESPONSIBILITY YOU HAVE GOT -- BEEN GIVEN UNDER THE RULES TO

1 TRY AND TREAD THAT LINE.

2 ON THE ONE HAND YOU HAVE GOT TO GO IN IN A CASE LIKE
3 THIS ONE AND LEARN A LOT OF TECHNICAL INFORMATION, TRY TO
4 ABSORB, YOU KNOW, HUNDREDS OF PAGES OF MATERIAL THAT BOTH
5 SIDES HAVE GIVEN YOU ON THESE TECHNICAL ISSUES AND GAIN AN
6 UNDERSTANDING OF MANY THINGS THAT YOU PROBABLY DON'T HAVE ANY
7 BACKGROUND IN PRIOR TO THAT AND GET DOWN TO THE NITTY GRITTY
8 OF, YOU KNOW, DOES THIS ALL MAKE SENSE OR NOT.

9 AND HAVING INVESTED ALL OF THAT TIME AND ENERGY AND
10 EFFORT TO TRY AND GET YOUR -- WRAP YOUR BRAIN AROUND ALL
11 THESE TECHNICAL ISSUES, THERE'S I THINK A NATURAL HUMAN
12 NATURE KIND OF RESPONSE TO SAY, WELL, YOU KNOW, I HAVE NOW
13 DECIDED THAT MR. X IS WRONG AND MRS. Y IS RIGHT AND RULE
14 ACCORDINGLY.

15 AND THAT -- WHEN YOU KEEP -- YOU HAVE TO KEEP THE LEGAL
16 FOREST ALWAYS IN MIND, AND THAT'S NOT YOUR JOB. THAT'S NOT
17 WITHIN YOUR DISCRETION TO DO. WHAT YOU HAVE GOT TO DO IS
18 LIMIT YOURSELF TO THE STUFF THAT'S REALLY OUTSIDE OF THE
19 SCIENCE, WHICH IS, WHICH IS JUSTICE BREYER'S POINT AND WHICH
20 IN THE KUMHO TIRE VERSUS CARMICHAEL CASE, WHICH IS A 1999 US
21 SUPREME COURT DECISION, THE COURT SAID TO THE -- TO THE
22 EXTENT THAT AN EXPERT'S OPINION FALLS WITHIN, QUOTE, THE
23 RANGE WHERE EXPERTS MIGHT REASONABLY DIFFER, CLOSED QUOTE, IT
24 SATISFIES RULE 702.

25 AND IN THE EEOC VERSUS FREEMAN CASE, THAT VERY RECENT

1 FOURTH CIRCUIT DECISION THAT DEFENDANTS ARE RELYING ON HERE,
2 THE FOURTH CIRCUIT ACTUALLY QUOTED THAT, THAT VERY LINE, AND
3 DECIDED IN THE CONTEXT OF THAT CASE, YOU KNOW, THAT THAT
4 EXPERT'S OPINIONS FELL OUTSIDE THAT RANGE. BUT WHAT YOU'RE
5 LOOKING AT IS A VERY BROAD RANGE OF POTENTIAL CONCLUSIONS
6 THAT ANY EXPERT IN THIS PARTICULAR AREA IN THIS CONTEXT, AN
7 EXPERT ON THE CAUSATION OF DISEASE POTENTIALLY CAUSED BY
8 TOXIC EXPOSURES, YOU KNOW, EXPERTS CAN AND DO DISAGREE ALL
9 THE TIME JUST LIKE LAWYERS CAN AND DO DISAGREE ALL THE TIME.
10 DOESN'T MEAN EITHER ONE OF THEM ARE BEING UNREASONABLE OR
11 UNSCIENTIFIC OR, YOU KNOW, USING AN UNRELIABLE METHODOLOGY.

12 SIMILARLY, IN A FIRST CIRCUIT DECISION CALLED MILWARD
13 VERSUS ACUITY SPECIALTY PRODUCTS THE FIRST CIRCUIT SAID TRIAL
14 COURTS ARE NOT, QUOTE, EMPOWERED TO DETERMINE WHICH OF
15 SEVERAL COMPETING SCIENTIFIC THEORIES HAS THE BEST PROVINCE,
16 CLOSED QUOTE. AND IN THE DAUBERT DECISION ITSELF THE SUPREME
17 COURT SAID THAT THE TRIAL COURT HAS TO FOCUS ON THE
18 PRINCIPLES AND METHODOLOGY EMPLOYED BY THE EXPERT, NOT ON THE
19 CONCLUSIONS REACHED.

20 AND PARTICULARLY IN THE CONTEXT OF ISSUES OF CAUSATION
21 OF CANCER, THE EXCEPTION OF ASBESTOS EXPOSURE LEADING TO
22 MESOTHELIOMA WHICH IS A SIGNAL TUMOR WHICH, YOU KNOW, THERE'S
23 VERY LITTLE EVIDENCE OF OTHER CAUSES OF MESOTHELIOMA BEYOND
24 ASBESTOS EXPOSURE, VIRTUALLY EVERY OTHER KIND OF CANCER,
25 REGARDLESS OF WHETHER IT CAN BE CAUSED BY SPECIFIC

1 CARCINOGENS, CAN HAVE LOTS OF OTHER CAUSES BESIDES THOSE
2 CARCINOGENS.

3 AND IN THAT CONTEXT THERE IS CERTAINLY ON SPECIFIC
4 CAUSATION BUT EVEN ON GENERAL CAUSATION A LOT MORE MUSHINESS,
5 FOR LACK OF A BETTER WORD, ABOUT THE LEVEL OF CERTAINTY THAT
6 SCIENCE IS GOING TO BE ABLE TO HAVE REGARDING THE CAUSAL
7 CONNECTION.

8 AND THEREFORE, THE EXPERTS WHO HAVE TO MAKE THESE
9 JUDGMENTS ABOUT CAUSATION, PEOPLE LIKE EPIDEMIOLOGISTS,
10 TOXICOLOGISTS, OCCUPATIONAL AND ENVIRONMENTAL MEDICINE
11 PHYSICIANS, THEY MUST USE A CAUSAL METHOD THAT IS BASICALLY A
12 INFERENCE TO THE BEST EXPLANATION. THAT IS, YOU KNOW, LET'S
13 COLLECT ALL THIS EVIDENCE THAT IS RELEVANT TO THE ISSUE.

14 IF YOU'RE TALKING ABOUT GENERAL CAUSATION, CAN BENZENE
15 CAUSE NON-HODGKIN'S LYMPHOMA AS AN EXAMPLE? LET'S COLLECT
16 ALL THE EPIDEMIOLOGY STUDIES THAT LOOK AT BENZENE-EXPOSED
17 POPULATIONS AND DETERMINE THEIR RISK OF NON-HODGKIN'S
18 LYMPHOMA. LET'S LOOK AT WHATEVER EVIDENCE IS AVAILABLE TO US
19 ABOUT WHETHER THERE ARE BIOLOGICAL MECHANISMS AVAILABLE THAT
20 COULD EXPLAIN HOW BENZENE MIGHT LEAD TO NON-HODGKIN'S
21 LYMPHOMA IN TERMS OF MECHANISMS WITHIN THE BODY THAT BENZENE
22 CAUSES OR METABOLITES CAUSE THAT ULTIMATELY LEAD TO LYMPHOMA.

23 AND YOU TAKE ALL OF THAT DATA THAT COMES FROM
24 EPIDEMIOLOGY STUDIES AND TOXICOLOGY STUDIES AND, YOU KNOW, IN
25 VITRO STUDIES OF CELL CULTURES AND YOU TAKE ALL OF THAT AND

1 YOU COLLECT IT AND YOU MAKE THE BEST INFERENCES AND THE BEST
2 CONCLUSIONS THAT YOU CAN. AND THAT'S THE METHOD THAT IS
3 APPLIED USING THE BRADFORD HILL FACTORS OR CRITERIA AS MR.
4 MCGOLDRICK CALLED THEM. THAT'S THE METHOD THAT HISTORICALLY
5 HAS BEEN AND STILL IS APPLIED. THAT'S THE SCIENTIFICALLY
6 GENERALLY ACCEPTED METHOD FOR ASSESSING CAUSATION.

7 WELL, THERE ARE LOTS OF STEPS THAT GO INTO THAT.
8 THERE'S LOTS OF EVALUATION OF BOTH INDIVIDUAL STUDIES AS TO
9 THEIR STRENGTH AND THE WEIGHT THAT SHOULD BE GIVEN THEM AND
10 TO THEIR STRENGTHS AND WEAKNESSES OF ANY INDIVIDUAL STUDY AND
11 THEN THERE'S ASSESSMENT OF THE STUDIES AS A WHOLE IN A
12 PARTICULAR AREA LIKE EPIDEMIOLOGY, STUDIES AS A WHOLE IN
13 TOXICOLOGY ON THE BIOLOGICAL MECHANISM ISSUE.

14 AND AT EVERY STEP ALONG THE WAY EXPERTS MUST AND DO
15 EXERCISE THEIR OWN INDEPENDENT SCIENTIFIC JUDGMENT OR THEY
16 RELY ON SCIENTIFIC JUDGMENT BY OTHERS IN MANY INSTANCES
17 LIKE -- GROUPS LIKE IARC AND THE NATIONAL TOXICOLOGY PROGRAM.
18 BUT IN ANY EVENT, THERE ARE MATTERS THAT GO INTO THAT THAT
19 ARE MATTERS OF SCIENTIFIC JUDGMENT. AND REASONABLE
20 SCIENTISTS CAN AND OFTEN DO DISAGREE ON THOSE MATTERS OF
21 SCIENTIFIC JUDGMENT ROUTINELY.

22 WHEN WE HAVE GOT ISSUES THAT, AS IN THIS CASE, REQUIRE
23 THE APPLICATION OF SCIENTIFIC JUDGMENT AT MANY STEPS ALONG
24 THE WAY, IT IS NOT WITHIN THIS COURT'S DISCRETION TO SAY THAT
25 ON THAT MATTER, ON THIS PIECE OF SAYING, YOU KNOW, I THINK

1 THAT THE STUDIES ON BENZENE-EXPOSED WORKERS DEVELOPING
2 NON-HODGKIN'S LYMPHOMA BASED ON THE RISK AND THE EPIDEMIOLOGY
3 STUDIES SHOW A CONSISTENT INCREASE IN RISK, THAT'S DR.
4 HARRISON'S VIEW.

5 THE EXPERTS FOR THE DEFENDANTS DISAGREE WITH HIM ON
6 THAT. THAT IS A MATTER OF SCIENTIFIC JUDGMENT THAT IT'S NOT
7 THIS COURT'S JOB TO DECIDE WHO IS RIGHT AND WHO IS WRONG.
8 THAT'S FOR THE JURY TO DECIDE.

9 AND YOU KNOW, I WANT TO POINT THE COURT TO A QUOTE.
10 IT'S A LENGTHY ONE HERE, A LOT OF WORDS, WAY TOO MUCH WORDS
11 THAT ARE SUPPOSED TO GO ON A SCREEN FOR A POWERPOINT
12 PRESENTATION. I APOLOGIZE FOR THAT. BUT THIS COMES FROM THE
13 RESTATEMENT THIRD OF TORTS SECTION 28, WHICH IS A SECTION
14 THAT DEALS WITH CAUSATION, AND COMMENT C IS A VERY LENGTHY
15 COMMENT THAT WAS DRAFTED AND INCLUDED IN THE RESTATEMENT
16 THIRD AND IT DEALS SPECIFICALLY WITH TOXIC EXPOSURES AND
17 DISEASE.

18 AND WHAT THE AMERICAN LAW INSTITUTE IN -- DECIDED TO
19 INCLUDE -- AND THE COMMENT IS CONSIDERED THE -- A PORTION OF
20 THE SUBSTANTIVE PART OF THE RESTATEMENT AS OPPOSED TO THE
21 REPORTER'S NOTES WHICH ARE NOT.

22 AND IT'S THEY WRITE, THE SCIENTIST'S REPORT THAT AN
23 EVALUATION OF DATA AND SCIENTIFIC EVIDENCE TO DETERMINE
24 WHETHER AN INFERENCE OF CAUSATION IS APPROPRIATE REQUIRES
25 JUDGMENT AND INTERPRETATION. SCIENTISTS ARE SUBJECT TO THEIR

1 OWN VALUE JUDGMENTS AND PREEXISTING BIASES THAT MAY AFFECT
2 THEIR VIEW OF A BODY OF EVIDENCE. THERE ARE INSTANCES IN
3 WHICH ALTHOUGH ONE SCIENTIST OR GROUP OF SCIENTISTS COMES TO
4 ONE CONCLUSION ABOUT FACTUAL CAUSATION, THEY RECOGNIZE THAT
5 ANOTHER GROUP THAT COMES TO A CONTRARY CONCLUSION MIGHT STILL
6 BE REASONABLE.

7 JUDGMENTS ABOUT CAUSATION MAY ALSO BE AFFECTED BY THE
8 COMPARATIVE COSTS OF ERRORS AS WHEN CAUTION COUNSELS IN FAVOR
9 OF DECLARING AN UNCERTAIN AGENT TOXIC BECAUSE THE POTENTIAL
10 HARM IT MAY CAUSE IF TOXIC IS SO MUCH GREATER THAN THE
11 BENEFIT FORGONE IF IT WERE PERMITTED TO BE INTRODUCED.

12 COURTS, THUS, SHOULD BE CAUTIOUS ABOUT ADOPTING SPECIFIC
13 SCIENTIFIC PRINCIPLES TAKEN OUT OF CONTEXT TO FORMULATE
14 BRIGHT LINE LEGAL RULES OR CONCLUDE THAT REASONABLE MINDS
15 CANNOT DIFFER ABOUT FACTUAL CAUSATION. AND AGAIN, THAT
16 ENTIRE STATEMENT WAS MADE IN THE CONTEXT OF DISCUSSION ABOUT
17 CAUSATION IN THE TOXIC EXPOSURE SETTING.

18 AND IN THE -- IN THE MILWARD CASE THEY MADE THE FIRST
19 CIRCUIT PANEL THAT DECIDED MILWARD -- AND I WILL BACK UP JUST
20 A SECOND TO TELL YOU ABOUT THAT CASE. MILWARD WAS A CASE
21 LIKE THIS ONE THAT INVOLVED A INDIVIDUAL WHO DEVELOPED CANCER
22 IN THAT INSTANCE, A SUBTYPE OF ACUTE MYELOID LEUKEMIA,
23 SUBTYPE OF AML AFTER WORKING AS A REFRIGERATION MECHANIC FOR
24 PERIOD OF SEVERAL YEARS; DECADES ACTUALLY.

25 MY LAW FIRM WAS INVOLVED IN THAT. I ARGUED THE CASE

1 BOTH IN THE TRIAL COURT IN -- UNSUCCESSFULLY AND GOT THE
2 FIRST CIRCUIT TO CHANGE -- CHANGE THE RULING. BUT, IN THAT
3 CASE THE ALLEGED EXPOSURE TO BENZENE, AS IN THIS CASE, CAME
4 FROM EXPOSURE TO A VARIETY OF SOLVENTS THAT THEY -- MR.
5 MILWARD HAD WORKED WITH OVER THE YEARS AS A REFRIGERATION
6 MECHANIC WHICH THESE WERE ORGANIC SOLVENTS PRODUCTS THAT WERE
7 PETROLEUM DISTILLATES INCLUDING MANY OF WHICH CONTAINED
8 MINERAL SPIRITS, THAT THE ALLEGATION WAS THESE PETROLEUM
9 DISTILLATE SOLVENTS HAVE SOME BENZENE IN THEM AND THAT
10 BENZENE EXPOSURE WAS JUST AS IT HAD BEEN IN THIS CASE,
11 QUANTIFIED BY A MODELING ESTIMATE DONE BY IN FACT DR. STEWART
12 IN THAT CASE.

13 AND BASED ON THAT QUANTIFIED ESTIMATED BENZENE EXPOSURE,
14 THE SPECIFIC CAUSATION EXPERT WAS -- WAS EXAMINING, MAKING AN
15 EVALUATION AS TO WHETHER THE BENZENE WAS A LIKELY
16 CONTRIBUTING FACTOR TO LEUKEMIA. THE ISSUE THAT THE CASE WAS
17 DECIDED ON THAT WENT UP TO THE FIRST CIRCUIT WAS GENERAL
18 CAUSATION. AND EVEN THOUGH -- EVEN THOSE DEFENSE EXPERTS
19 AGREE THAT BENZENE CAN CAUSE AML GENERALLY, THE ISSUE WAS
20 WAS, DOESN'T CAUSE THIS PARTICULAR KIND OF AML THAT
21 MR. MILWARD HAD.

22 AND SO WE HAD A BIG HEARING. THERE WAS LIVE TESTIMONY
23 IN THAT HEARING. DISTRICT COURT ENDED UP SIDING WITH THE
24 DEFENSE. AND ON APPEAL THE FIRST CIRCUIT MADE SIGNIFICANT
25 USE AND QUOTED AT LENGTH THIS RESTATEMENT SECTION 28 COMMENT

1 C THAT I JUST QUOTED FROM IN THE LAST SLIDE, AND THEY QUOTE
2 FROM IT HERE.

3 AND IN DISCUSSING THE MODE OF REASONING THAT APPLIES IN
4 THIS GENERAL CAUSATION CONTEXT THEY SAY, IN THIS MODE OF
5 REASONING THE USE OF SCIENTIFIC JUDGMENT IS NECESSARY. NO
6 ALGORITHM EXISTS FOR APPLYING THE HILL GUIDELINES TO
7 DETERMINE WHETHER AN ASSOCIATION TRULY REFLECTS A CAUSAL
8 RELATIONSHIP OR IS SPURIOUS. BECAUSE NO SCIENTIFIC
9 METHODOLOGY EXISTS FOR THIS PROCESS REASONABLE SCIENTISTS MAY
10 COME TO DIFFERENT JUDGMENTS ABOUT WHETHER SUCH AN INFERENCE
11 IS APPROPRIATE.

12 AND LATER ON IN THE DECISION THE FIRST CIRCUIT ENDED UP
13 SAYING THE DISTRICT COURT OVERSTEPPED ITS BOUNDARIES AS A
14 GATEKEEPER BY MAKING A DECISION TO EXCLUDE DR. SMITH IN THAT
15 CASE WHO WAS THE EXPERT OPINING ABOUT GENERAL CAUSATION ON
16 ISSUES WHERE THE STATE OF THE SCIENCE WAS LOTS OF EXPERTS
17 DISAGREED WITH ONE ANOTHER.

18 AND THIS IS THE QUOTE OR ONE OF THE QUOTES THAT REFLECT
19 THAT. TRIAL COURTS SHOULD NOT TAKE SIDES ON QUESTIONS THAT
20 ARE CURRENTLY THE FOCUS OF EXTENSIVE SCIENTIFIC RESEARCH AND
21 DEBATE AND ON WHICH REASONABLE SCIENTISTS CAN CLEARLY
22 DISAGREE.

23 AND BEFORE I GO ON TO THE NEXT POINT AND THE NEXT SLIDE,
24 THAT IS THIS CASE WHEN IT COMES -- ESPECIALLY TO GENERAL
25 CAUSATION, YOUR HONOR. GENERAL CAUSATION, AT LEAST AS FRAMED

1 THE WAY WE BELIEVE IT SHOULD BE FRAMED IN THIS CASE, WHICH IS
2 CAN BENZENE, NOT MINERAL SPIRITS, BUT BENZENE, CAN BENZENE
3 CAUSE NON-HODGKIN'S LYMPHOMA. THAT IS DEFINITELY A MATTER ON
4 WHICH THERE CAN BE AND IS ONGOING DEBATE IN THE RELEVANT
5 SCIENTIFIC COMMUNITY.

6 THE FACT THAT IARC HAS SAID THERE IS LIMITED EVIDENCE TO
7 SHOW THAT BENZENE COULD CAUSE NHL, THAT MAY SOUND LIKE THE
8 IARC IS SAYING THERE'S NOT VERY GOOD EVIDENCE. THAT'S NOT
9 WHAT THAT MEANS. IT MEANS THAT THERE IS STILL SOME
10 UNCERTAINTY ASSOCIATED WITH IN IARC'S -- IN THE VIEW OF THE
11 IARC INTERNATIONAL AGENCY FOR RESEARCH ON CANCER. WE GET TOO
12 ACCUSTOMED TO THROWING AROUND ACRONYMS WITHOUT EXPLAINING
13 OURSELVES.

14 BUT THE INTERNATIONAL AGENCY FOR RESEARCH ON CANCER
15 BRINGS IN A GROUP OF EXPERTS FROM AROUND THE WORLD TO ADDRESS
16 WHETHER OR NOT PARTICULAR CHEMICALS OR GROUPS OF CHEMICALS
17 CAN CAUSE CANCER, AND THEY CALL THOSE GROUPS WORKING GROUPS.
18 AND EACH WORKING GROUP IS ASSIGNED TO A SPECIFIC CHEMICAL OR
19 A SPECIFIC SET OF CHEMICALS. AND THEY -- THEY DID THAT A FEW
20 YEARS AGO TO UPDATE THEIR CLASSIFICATION OF THE
21 CARCINOGENICITY OF BENZENE.

22 AND THOSE EXPERTS CAN SAY -- THEY HAVE BASICALLY FOUR
23 CATEGORIES OF EVIDENCE THAT THEY CAN CLASSIFY EPIDEMIOLOGY
24 STUDIES AS A WHOLE. THEY LOOK AT ALL THE PUBLISHED AND IN
25 SOME INSTANCES EVEN UNPUBLISHED DATA ABOUT BENZENE IN THIS

1 INSTANCE AND NON-HODGKIN'S LYMPHOMA. AND THEY CAN EITHER SAY
2 THAT THAT EVIDENCE, THE HIGHEST LEVEL OF CLASSIFICATION THEY
3 CAN APPLY IS SUFFICIENT, BUT THIS EVIDENCE IS SUFFICIENT
4 EVIDENCE IN HUMANS TO SHOW THAT BENZENE CAN CAUSE NHL.

5 THE NEXT LEVEL DOWN IS LIMITED EVIDENCE. THE THIRD
6 LEVEL DOWN IS INADEQUATE EVIDENCE. CANNOT SAY ONE WAY OR THE
7 OTHER. AND THE FOURTH AND LOWEST CATEGORY THAT IARC USES IN
8 THAT CLASSIFICATION SYSTEM IS -- I'M GOING TO SAY IT
9 INCORRECTLY -- BUT PARAPHRASING, INDICATES THAT IS UNLIKELY
10 THAT -- THE COLLECTIVE EVIDENCE INDICATES IT'S UNLIKELY THAT
11 THERE'S A CAUSAL CONNECTION.

12 SO, THE BOTTOM TWO ARE PROBABLY NOT AND WE CAN'T SAY ONE
13 WAY OR THE OTHER. THE TOP TWO ARE LIMITED EVIDENCE AND
14 SUFFICIENT EVIDENCE. AND LIMITED EVIDENCE, EVEN THOUGH THAT
15 THE -- IT CERTAINLY INVOLVES SOME LEVEL OF UNCERTAINTY ON
16 PART -- ON THE PART OF THE WORKING GROUP IS AN INDICATION
17 THAT MORE LIKELY THAN NOT THERE IS A CONNECTION.

18 I WANT TO ADDRESS SOME OF THE SPECIFIC CRITIQUES AND
19 ISSUES THAT COUNSEL RAISED. MR. MCGOLDRICK ARGUES BOTH IN
20 HIS PAPERS AND TO SOME EXTENT TODAY THAT IN THE ABSENCE OF
21 STATISTICALLY SIGNIFICANT EVIDENCE SHOWING MORE THAN A
22 DOUBLING OF RISK OF NON-HODGKIN'S LYMPHOMA, AND OF COURSE HE
23 SAYS FROM MINERAL SPIRITS, AND I'LL ADDRESS THAT IN MORE
24 DETAIL IN A MOMENT, BUT -- WHETHER WE ARE TALKING ABOUT
25 MINERAL SPIRITS OR BENZENE -- THAT IN THE ABSENCE OF HAVING

1 THOSE KINDS OF EPIDEMIOLOGY STUDIES THAT SHOW A DOUBLING OF
2 RISKS THAT'S STATISTICALLY SIGNIFICANT BASED ON THE EXPOSURES
3 THAT, YOU KNOW, WE HAVE FAILED TO SATISFY DAUBERT AND DR.
4 HARRISON'S OPINIONS HAVE TO BE THROWN OUT. AND THAT'S
5 CLEARLY WRONG IN THE FOURTH CIRCUIT.

6 AND YOU KNOW, THE BENEDI DECISION BY JUDGE ANDERSON, YOU
7 KNOW, MAKES THAT UNEQUIVOCALLY CLEAR. IT JUST SAYS
8 EPIDEMIOLOGICAL STUDIES ARE NOT NECESSARILY REQUIRED TO PROVE
9 CAUSATION AS LONG AS -- LONG AS THE METHODOLOGY EMPLOYED BY
10 THE EXPERT IN REACHING HIS OR HER CONCLUSION IS SOUND.

11 AND THEN IN WESTBERRY, THE FOURTH CIRCUIT REJECTED A
12 SIMILAR ARGUMENT THAT THE FAILURE TO BASE A CAUSATION OPINION
13 ON PEER REVIEWED PUBLISHED EPIDEMIOLOGICAL STUDIES OF ANY
14 TYPE, NOT -- NOT -- NOT EVEN GETTING TO THE ISSUE OF WHETHER
15 YOU HAVE TO HAVE A DOUBLING OF THE RISK OR GREATER AS MR.
16 MCGOLDRICK ARGUES HERE.

17 SO YOU DON'T HAVE TO HAVE EPIDEMIOLOGY STUDIES AT ALL
18 MUCH LESS THOSE THAT SHOW A DOUBLING OF THE RISK, AND THAT'S
19 THE LAW IN THIS CIRCUIT AND IT IS FRANKLY THE LAW IN MOST
20 CIRCUITS. WHAT MR. MCGOLDRICK THEN GOES ON TO ARGUE IS,
21 WELL, THAT'S WHAT BENEDI AND WESTBERRY SAY IN THE CONTEXT OF
22 THOSE EXPOSURES, THOSE EXPOSURES WERE VERY DIFFERENT THAN
23 THESE EXPOSURES, AND WHAT WE ARE DEALING WITH HERE IS, YOU
24 KNOW, A KIND OF DISEASE THAT HAS MANY SO-CALLED IDIOPATHIC
25 CASES AND MANY ALTERNATIVE CAUSES, AND WHEN YOU HAVE GOT LOTS

1 OF UNKNOWN CAUSES OF THE DISEASE, THEN, YOU KNOW, YOU HAVE TO
2 HAVE THIS DOUBLING OF THE RISK AND YOU HAVE TO HAVE
3 EPIDEMIOLOGY. AND, YOU KNOW, THAT'S JUST INCONSISTENT
4 WITH -- WITH WESTBERRY.

5 *THE COURT:* IF I UNDERSTAND MR. MCGOLDRICK'S
6 ARGUMENT -- AND MR. MCGOLDRICK, YOU CAN PROBABLY CLARIFY FOR
7 US -- I DON'T THINK THAT -- I DIDN'T INTERPRET HIS ARGUMENT
8 AS REQUIRING THIS GREATER THAN 2.0 STATISTICAL SIGNIFICANCE
9 IN EVERY CASE. BUT I THINK THAT WHAT HE INTIMATED WAS THAT
10 WHERE HERE DR. HARRISON HIMSELF EMPLOYED THE BRADFORD HILL
11 CRITERIA, THAT HE DID NOT PROPERLY EMPLOY THOSE FACTORS TO
12 ADDRESS THE STRENGTH OF ASSOCIATION AND THE CONSISTENCY OF
13 ASSOCIATION WHICH THIS STATISTICAL SIGNIFICANCE WOULD HAVE A
14 BEARING ON, THE 2.0 STATISTICAL SIGNIFICANCE.

15 AND SO, I'M NOT -- AND MR. MCGOLDRICK, YOU CAN CORRECT
16 ME IF THAT'S -- IF MY INTERPRETATION IS INCORRECT.

17 *MR. MCGOLDRICK:* NO, YOUR HONOR. THAT'S CORRECT.
18 I MEAN, STATISTICAL SIGNIFICANCE BEING ABOVE 1.0 AND HAVING A
19 CONFIDENCE INTERVAL THAT DOESN'T INCLUDE ONE, THAT'S
20 STATISTICAL SIGNIFICANCE. BUT TO ASK HARRISON, CAN YOU
21 IDENTIFY ANY STUDIES THAT ARE STATISTICALLY SIGNIFICANT ABOVE
22 1.0, ET CETERA? HE SAID NO. CAN YOU IDENTIFY ANY WITH 2.0?
23 HE ALSO SAID NO. AND THAT'S STRIKING BECAUSE AN EXPERT LIKE
24 HIM WHO TESTIFIES ALL OVER THE PLACE, IF YOU HAVE A 2.0,
25 THAT'S A BENCHMARK THAT EVERY JURISDICTION IS GOING TO SAY

1 THAT'S OKAY.

2 SO, HE DIDN'T KNOW THE ANSWER TO THAT. AND I ALSO ASKED
3 HIM, WELL WHAT ABOUT -- FORGET ABOUT STATISTICAL
4 SIGNIFICANCE, JUST A POSITIVE ASSOCIATION EVEN IF IT'S NOT,
5 AND HE COULDN'T IDENTIFY THOSE EITHER.

6 THE COURT: RIGHT. SO THAT ARGUMENT WENT TO THE
7 RELIABILITY OF THE EXPERT TESTIMONY, NOT NECESSARILY THE
8 SCIENTIFIC JUDGMENT. AND I THINK THAT, YOU KNOW, NOW GRANTED
9 IT'S BEEN -- I WAS A BIOLOGY MAJOR AND CHEMISTRY MINOR IN
10 COLLEGE AND IT'S BEEN YEARS SINCE I'VE CONDUCTED ANY RESEARCH
11 IN A LABORATORY MYSELF, BUT I'M SOMEWHAT FAMILIAR WITH THE
12 SCIENTIFIC PROCESS.

13 AND I DON'T WANT US TO GET TOO MAYBE LAZY IS NOT THE
14 APPROPRIATE WORD, BUT THROWING AROUND SCIENTIFIC JUDGMENT.
15 JUST BECAUSE SOMEONE IS A SCIENTIST, EVERY JUDGMENT THAT THEY
16 HAVE IS NOT NECESSARILY A SCIENTIFIC JUDGMENT IN MY OPINION.
17 THE SCIENTIFIC JUDGMENT AND REALLY ANY OPINION UNDER DAUBERT
18 AND UNDER 702 IT HAS TO INITIALLY SATISFY IS THIS AN ARENA IN
19 WHICH THE INFORMATION OR TESTIMONY WOULD BE HELPFUL TO THE
20 JURY.

21 AND SO, IT HAS TO BE SCIENTIFIC TESTIMONY OF A
22 SPECIALIZED NATURE, SOMETHING TECHNOLOGICAL THAT A LAYPERSON
23 WOULD NOT BE ABLE TO GRASP, NOT SO MUCH I CAN TELL YOU THERE
24 ARE 10 FACTORS, AND SOMETIMES IT'S ONE, SOMETIMES IT'S TWO,
25 SOMETIMES IT'S SEVERAL, MORE THAN HALF OF THE TIME WE DON'T

1 EVEN KNOW WHAT IT IS. BUT JUST BECAUSE A SCIENTIST SAYS THAT
2 DOES NOT NECESSARILY RENDER THAT AS A SCIENTIFIC JUDGMENT I
3 THINK. THAT'S SORT OF MY GUT FEELING.

4 MY UNDERSTANDING OF THE BRADFORD HILL FACTORS THAT THE
5 ARGUMENT THAT THE DEFENDANTS ARE MAKING IS THE CHALLENGE TO
6 DR. HARRISON'S OWN CHOSEN METHODOLOGY. AND THEY DON'T HAVE A
7 BEEF WITH WHAT HE USED, BUT THEY HAVE A BEEF WITH HOW HE USED
8 IT AND THAT THEY DIDN'T -- THAT DR. HARRISON HIMSELF DID NOT
9 FULLY EXECUTE ON HIS CHOSEN METHODOLOGY.

10 I'M ASSUMING HE COULD HAVE CHOSEN ANOTHER METHODOLOGY.
11 HE HAS CHOSEN THE DIFFERENTIAL DIAGNOSIS ETIOLOGY PROCESS,
12 AND THAT'S FINE, BUT THEN THE QUESTION IS, HAVING CHOSEN
13 THAT, HAS -- DOES HE SATISFY THE DAUBERT REQUIREMENTS, THE
14 FOUR FACTORS ORIGINALLY UNDER DAUBERT AND THE, YOU KNOW, FOUR
15 OR FIVE OTHER FACTORS THAT HAVE BEEN DEVELOPED IN ITS PROGENY
16 AND THAT'S WHAT I'M REALLY MORE INTERESTED IN HEARING ABOUT.

17 HOW DOES DR. HARRISON'S OPINION SATISFY DAUBERT AND
18 PROGENY? AND AS FAR AS WESTBERRY GOES -- AND I'LL STOP
19 TALKING IN JUST A SECOND. BUT AS FAR AS WESTBERRY GOES, I
20 THINK, YOU KNOW, THE ISSUE THAT WESTBERRY POSES FOR ME IS
21 IT'S A 1999 CASE, SO YOU KNOW, 16 -- BACK WHEN I WAS IN
22 COLLEGE, AND -- OR NO, NOT EVEN. THAT WAS BEFORE THAT.

23 AND IN WESTBERRY THEY SAY YOU CAN'T, YOU KNOW, IT'S THIS
24 TALC AND, YOU KNOW, ARE THERE ANY STUDIES, ARE THERE NONE?
25 WE ARE NOT GOING TO REJECT THE EXPERT WITNESS'S TESTIMONY

1 BECAUSE OF HIS FAILURE TO RELY ON PEER REVIEWED STUDIES WHEN
2 THEY DID NOT EXIST. AND YOU KNOW, I THINK BACK WHEN I WAS A
3 BIOLOGY MAJOR, I THOUGHT THAT WE KNEW A LOT ABOUT THE HUMAN
4 BODY AND I THOUGHT THAT -- THAT IT TOOK ME A LONG TIME TO GO
5 THROUGH ALL THOSE BOOKS.

6 AND IN THE INTERVENING YEARS, 20 YEARS, THE HUMAN GENOME
7 HAS BEEN MAPPED. WHEN I WAS IN BIOLOGY, WE DIDN'T KNOW THE
8 HUMAN GENOME. SO THERE'S BEEN IN THE INTERVENING PERIOD OF
9 TIME A HUGE AMOUNT OF RESEARCH THAT HAS ALLOWED FURTHER
10 STUDIES ON THINGS THAT WE -- WE HAD NO CLUE ABOUT 15, 20
11 YEARS AGO.

12 AND SO I THINK WESTBERRY HAS THE IMPORTANCE IN 1999
13 WHERE THERE IS NO STUDY AVAILABLE. BUT I THINK -- I THINK
14 THAT THE DEFENDANTS' ARGUMENT IS WHERE THE STUDIES ARE
15 AVAILABLE, WHERE THERE ARE EPIDEMIOLOGICAL STUDIES TO PRETEND
16 THAT THEY ARE NOT THERE OR TO IGNORE THEM WILLINGLY RAISES A
17 QUESTION ABOUT THE RELIABILITY OF THE SCIENTIFIC TESTIMONY
18 THAT IS BEING OFFERED THROUGH DR. HARRISON. I THINK THAT
19 THAT'S WHAT I UNDERSTAND THEIR CHALLENGE TO BE.

20 SO, WHETHER WESTBERRY REQUIRED AT THE TIME AND WHETHER
21 WESTBERRY IS STILL GOOD LAW, AND YOU KNOW, I -- WE
22 SHEPHERDIZED AND IT'S BEEN CITED, IT'S BEEN -- EVEN IN THE
23 FOURTH CIRCUIT I THINK IN THE CONNOR CASE IT'S BEEN MODIFIED
24 AND SAID, YOU KNOW, YOU REALLY NEED TO DO SOME
25 EPIDEMIOLOGICAL STUDIES, BUT IT'S -- IT'S A GUIDE, IT'S NOT

1 THE RULE I THINK, AND SO THAT'S -- SO MY CONCERN IS NOT
2 WHETHER IT'S REQUIRED OR NOT BUT UNDER DAUBERT DOES IT MAKE
3 MORE RELIABLE THE -- OR AT ALL RELIABLE THE OPINION OF DR.
4 HARRISON IF HE HAS FAILED TO ADDRESS ONE OF THE FACTORS OR
5 SEVERAL OF THE FACTORS UNDER DAUBERT.

6 MR. JENSEN: OKAY. WELL, THANK YOU, YOUR HONOR. I
7 THINK MR. MCGOLDRICK IS CLARIFYING THAT HE'S BACKING OFF THE
8 BRIGHTLINE POSITION WHICH I UNDERSTOOD AT LEAST HE -- HIS
9 CLIENT TOOK IN THE PAPERS TO SAY THAT IN THE ABSENCE OF
10 STATISTICALLY SIGNIFICANT DOUBLING OF THE RISK, YOU KNOW, YOU
11 LOSE.

12 AND RATHER WHAT HE'S SAYING IS DR. HARRISON COULDN'T
13 ANSWER MY QUESTIONS AT THE DEPOSITION ABOUT, YOU KNOW, HOW
14 MANY STUDIES WERE STATISTICALLY SIGNIFICANT, HOW MANY STUDIES
15 WERE DOUBLING OF THE RISK, HOW MANY STUDIES WERE POSITIVE
16 VERSUS NEGATIVE, AND THAT MAKES HIS OPINION UNRELIABLE WHEN
17 IT COMES TO THE GENERAL CAUSATION ISSUE CAN PC -- CAN BENZENE
18 CAUSE NHL, OR AS MR. MCGOLDRICK WOULD HAVE YOU DECIDE THE
19 CASE, CAN MINERAL SPIRITS CAUSE NON-HODGKIN'S LYMPHOMA.

20 AND AGAIN, I WANT TO PUT THAT PIECE OFF FOR A MINUTE.
21 ON THE ISSUE OF WHETHER BENZENE CAN CAUSE NON-HODGKIN'S
22 LYMPHOMA FROM A GENERAL CAUSATION STANDPOINT, YOU HAVE TO
23 LOOK NOT JUST AT DR. HARRISON'S REPORT AND DEPOSITION
24 TESTIMONY BUT WHAT HE ATTACHED WITH HIS REPORT WHICH IS THIS
25 GARCIA DECLARATION. AND YES, IT'S EIGHT YEARS OLD, BUT, YOU

1 KNOW, THAT DATA IS A VAST AMOUNT -- DISCUSSED IN THAT
2 DECLARATION, THE STUDIES DISCUSSED IN THAT DECLARATION
3 REFLECT A VAST AMOUNT OF EPIDEMIOLOGICAL LITERATURE THAT
4 RELATES TO THE ISSUE OF WHETHER BENZENE CAN CAUSE
5 NON-HODGKIN'S LYMPHOMA, AND I WILL ADD MUCH OF THAT
6 LITERATURE DEALS WITH EXPOSURES TO BENZENE. IN FACT, MOST OF
7 IT DEALS WITH EXPOSURES TO BENZENE COMING FROM ORGANIC
8 SOLVENTS SUCH AS AND INCLUDING MINERAL SPIRITS.

9 BUT THE FOCUS IN THAT LITERATURE IS ON BENZENE AND
10 WHETHER BENZENE CAN CAUSE NHL. AND HE NOT ONLY REVIEWED THAT
11 LITERATURE BUT HE PAINSTAKINGLY GOES THROUGH THAT -- THOSE
12 PUBLICATIONS, DISCUSSES, SUMMARIZES THEM, AND THEN REACHES
13 CONCLUSIONS ABOUT NOT JUST THE EPIDEMIOLOGICAL STUDIES BUT
14 THE TOXICOLOGICAL STUDIES, ALL THAT STUFF THAT GOES INTO THE
15 WEIGHT OF THE EVIDENCE ANALYSIS, THIS INFERENCE TO THE BEST
16 EXPLANATION APPROACH, WHICH UNDER THE BRADFORD HILL FACTORS
17 IS THE STANDARDIZED GENERALLY-ACCEPTED APPROACH THAT
18 SCIENTISTS CAN AND DO USE. AND--

19 THE COURT: BUT HE DID THAT IN 2007.

20 MR. JENSEN: YES.

21 THE COURT: HE HAS NOT EXHAUSTIVELY RESEARCHED AND
22 REVIEWED ALL THE SUBSEQUENT, LIKE HUNDREDS I THINK IT'S
23 SUGGESTED, EPIDEMIOLOGICAL STUDIES WHICH HE KNOWS EXIST IN
24 ORDER TO SUSTAIN HIS OPINION FROM 2007 IS STILL HIS OPINION
25 IN 2012 OR '13 OR WHENEVER HE HAD HIS DEPOSITION TAKEN;

1 RIGHT?

2 MR. JENSEN: WELL, YES AND NO. AND THE NO PART
3 IS -- YES, DR. HARRISON HAS NOT GONE THROUGH AND UPDATED, YOU
4 KNOW, EVERYTHING THAT HE SAYS IN THE GARCIA DECLARATION. TO
5 SAY, HOWEVER, TO SUGGEST -- AND I DON'T THINK MR. MCGOLDRICK
6 WAS SAYING THIS, BUT I THINK HE MISUNDERSTOOD, YOU KNOW. I
7 COULD BE WRONG. BUT I DO NOT BELIEVE THAT THERE'S ANYTHING
8 CLOSE TO HUNDREDS OF NEW STUDIES THAT HAVE COME OUT IN THE
9 INTERIM.

10 THERE ARE NEW STUDIES, THERE ARE META-ANALYSES, MORE
11 THAN ONE, AND META-ANALYSES -- AND I WILL DISCUSS THEM -- ONE
12 OF THEM AT LEAST IN A LITTLE BIT OF DETAIL IN A MOMENT -- BUT
13 ARE WHERE THE SCIENTISTS TAKE DATA FROM A NUMBER OF STUDIES
14 AND COMBINE THAT DATA MATHEMATICALLY AND DO STATISTICAL
15 ANALYSES ON THE COMBINED SET OF DATA. AND THE REASON THAT
16 THEY DO THAT IS THAT IT'S OFTEN THE CASE THAT SMALLER STUDIES
17 WON'T HAVE STATISTICAL POWER TO FIND SIGNIFICANT ASSOCIATIONS
18 EVEN IF THERE IS A REAL CAUSAL ASSOCIATION PRESENT.

19 AND SO, THE THOUGHT IS IF YOU CAN COMBINE THE DATA FROM
20 MULTIPLE STUDIES, YOU WILL GET A BETTER SENSE BOTH OF WHETHER
21 THERE REALLY IS AN ASSOCIATION, NUMBER ONE, AND NUMBER ONE --
22 AND NUMBER TWO, WHETHER THERE IS CONSISTENCY ACROSS THE
23 STUDIES.

24 META-ANALYSIS IS A MATHEMATICAL OR STATISTICAL TOOL TO
25 QUANTITATIVELY ASSESS CONSISTENCY WHICH IS ONE OF THE

1 BRADFORD HILL GUIDELINES AND ONE OF THE GUIDELINES THAT MR.
2 MCGOLDRICK CLAIMS THAT DR. HARRISON IS NOT FOLLOWING BASED ON
3 HIS DEPOSITION TESTIMONY.

4 BUT HERE IS MY POINT. MY POINT IS THAT LITERATURE THAT
5 IS REVIEWED PAINSTAKINGLY THOROUGHLY IN THE 200-AND-SOME-ODD
6 PAGE GARCIA DECLARATION IS STILL LITERATURE THAT IS TODAY
7 QUITE RELEVANT TO THE ISSUE OF WHETHER BENZENE CAN CAUSE
8 NON-HODGKIN'S LYMPHOMA. THERE ARE ADDITIONAL STUDIES AND
9 META-ANALYSES THAT ARE ALSO RELEVANT.

10 DR. HARRISON IN HIS AFFIDAVIT DISCUSSES SOME OF THOSE
11 AND HAS MENTIONED SOME OF THEM IN -- I BELIEVE IN HIS
12 DEPOSITION TESTIMONY. BUT NO ONE, NO SCIENTIST WOULD SAY
13 THAT THE STUDIES THAT ARE DISCUSSED IN THE GARCIA DECLARATION
14 ARE SOMEHOW NOW NOT RELEVANT BECAUSE SEVEN OR EIGHT YEARS
15 HAVE PASSED BY. YOU'D HAVE TO TAKE ALL OF THOSE STUDIES INTO
16 ACCOUNT.

17 AND WHAT DR. HARRISON IS SAYING IS THAT THOSE STUDIES
18 COLLECTIVELY SHOW IN MY SCIENTIFIC JUDGMENT THAT BENZENE --
19 OCCUPATIONALLY-EXPOSED WORKERS WHO WORKED WITH BENZENE AND
20 BENZENE-CONTAINING ORGANIC SOLVENTS ARE CONSISTENTLY AT
21 INCREASED RISK OF DEVELOPING NON-HODGKIN'S LYMPHOMA, AND
22 THAT'S WHAT HE CONCLUDES AFTER EXHAUSTIVELY REVIEWING THAT --
23 REVIEWING THAT MATERIAL.

24 AND YOU CAN'T JUST IGNORE THE FACT THAT HE'S DONE THAT
25 AND GO BY THE FACT THAT HE DOESN'T KNOW OFF THE TOP OF HIS

1 HEAD IN A DEPOSITION TAKING IN 2015, 2014, YOU KNOW, HOW MANY
2 OF THOSE STUDIES SHOWED A STATISTICALLY SIGNIFICANT POSITIVE
3 ASSOCIATION OR HOW MANY OF THOSE STUDIES SHOWED A DOUBLING OF
4 THE RISK. YOU KNOW, HE DIDN'T GO THROUGH THAT EXERCISE.
5 IT'S NOT THE CRITERIA. THOSE TWO CRITERIA, NOT -- NOT
6 CRITERIA THAT ARE AMONG THE BRADFORD HILL LIST. CONSISTENCY
7 IS. STRENGTH OF ASSOCIATION IS. BUT SPECIFICALLY DRAWING
8 THOSE KINDS OF BRIGHT LINES IS NOT.

9 AND WHAT, YOU KNOW, BRADFORD HILL HIMSELF SAID IS WE
10 CAN'T PUT TOO MUCH WEIGHT ON WHETHER ANY GIVEN STUDY IS
11 STATISTICALLY SIGNIFICANT OR NOT. WE HAVE TO LOOK AT ALL THE
12 DATA AND COLLECTIVELY AND, YOU KNOW, OBVIOUSLY STATISTICAL
13 SIGNIFICANCE CARRIES AN IMPORTANT -- IS AN IMPORTANT
14 CONSIDERATION, BUT YOU DON'T IGNORE DATA JUST BECAUSE IT'S
15 NONSIGNIFICANT.

16 SO ANYHOW, THE ANALYSIS THAT DR. HARRISON HAS GONE
17 THROUGH AS REFLECTED IN THE GARCIA DECLARATION IS THE RIGHT
18 ANALYSIS, IT'S THE METHOD THAT IS GENERALLY ACCEPTED, THERE'S
19 NO EVEN DEBATE ABOUT THAT, AND IT IS ENOUGH IN AND OF ITSELF
20 TO SAY THAT ON THE ISSUE OF GENERAL CAUSATION, DR. HARRISON'S
21 OPINIONS THAT BENZENE CAN CAUSE NON-HODGKIN'S LYMPHOMA SHOULD
22 SURVIVE RULE 702 SCRUTINY.

23 NOW MR. MCGOLDRICK SAID, WELL, THAT AFFIDAVIT WAS
24 PREPARED IN ANOTHER CASE INVOLVING ANOTHER KIND OF EXPOSURE
25 AND IT DOESN'T -- HE HASN'T SHOWN THAT IT FITS THE FACTS OF

1 THIS CASE. WELL, THAT'S NOT -- THAT'S NOT CORRECT. THAT
2 DECLARATION WAS PREPARED SPECIFICALLY ON THE ISSUE OF GENERAL
3 CAUSATION. IT WAS NOT PREPARED ON SPECIFIC CAUSATION.

4 IT WAS NOT ANALYZING THE PLAINTIFFS -- THE SPECIFIC
5 PLAINTIFF IN THAT CASE IS EXPOSURES AND WHETHER OR NOT IN THE
6 ALTERNATIVE CAUSES, POTENTIAL ALTERNATIVE CAUSES AND SPECIFIC
7 CAUSATION, NONE OF THAT IS DISCUSSED IN THE DECLARATION. AND
8 I WOULD ADD THAT THE DECLARATION ENCOMPASSES LITERATURE AND
9 STUDIES THAT ARE DONE ACROSS A WIDE VARIETY OF DIFFERENT
10 OCCUPATIONS AND EXPOSURE SETTINGS.

11 AND SO, IT IS A GENERAL CAUSATION DECLARATION, IT
12 APPLIES WITH EQUAL FORCE IN THIS CASE AS IT DID IN THE GARCIA
13 CASE ITSELF AND IT IS ENOUGH, AS I SAID, TO GET TO GENERAL --
14 TO GET PAST RULE 702 INQUIRY WITH RESPECT TO GENERAL
15 CAUSATION.

16 *THE COURT:* WELL, I THINK THE DEFENDANTS CHALLENGED
17 THAT THE STUDIES -- THAT THE MAJORITY OF THE STUDIES THAT
18 WERE CITED IN THE DECLARATION DID NOT HAVE TO DO WITH BENZENE
19 BEING ASSOCIATED WITH ANY TYPE OF BLOOD CANCER. IS THAT NOT
20 ACCURATE? THE OVERWHELMING MAJORITY OF THE STUDIES THAT DR.
21 HARRISON CITES WERE STUDIES THAT DID NOT INVOLVE BENZENE AND
22 A BLOOD -- HAVING A CAUSATION TO NON-HODGKIN'S LYMPHOMA; IS
23 THAT -- OR ANY BLOOD CANCER.

24 *MR. JENSEN:* LIKE DR. HARRISON, I HAVEN'T TRIED TO
25 COUNT HOW MANY STUDIES SHOWED A POSITIVE ASSOCIATION VERSUS A

1 NULL ASSOCIATION, HOW MANY OF THOSE STUDIES SHOWED A POSITIVE
2 ASSOCIATION THAT WAS NOT STATISTICALLY SIGNIFICANT, HOW MANY
3 OF THOSE STUDIES SHOWED A POSITIVE ASSOCIATION THAT WAS ABOVE
4 2.0, HOW MANY OF THOSE WERE STATISTICALLY SIGNIFICANT VERSUS
5 NOT STATISTICALLY SIGNIFICANT.

6 AND JUST SO I'M SURE THE COURT UNDERSTANDS THIS, I THINK
7 YOU ALREADY DO, BUT THE ISSUE OF THE SIZE OF THAT RELATIVE
8 RISK WHERE ODDS RATIO OR STANDARDIZED MORTALITY RATIO, THE
9 SIZE OF THE ASSOCIATION IS MEASURED IN ANY GIVEN EPIDEMIOLOGY
10 STUDY THAT WHETHER IT'S OVER 2.0 OR NOT, THAT'S A SEPARATE
11 ISSUE FROM WHETHER IT'S STATISTICALLY SIGNIFICANT.

12 YOU CAN HAVE A -- AN ASSOCIATION THAT'S, YOU KNOW, 50
13 TIMES EXPECTED AND THEY MIGHT NOT BE STATISTICALLY
14 SIGNIFICANT. SO, AND THAT JUST DEPENDS ON WHETHER THE
15 CONFIDENCE INTERVAL AT THE 95 PERCENT CONFIDENCE LEVEL AND --
16 GETTING INTO A LOT OF DETAIL HERE -- BUT DOES THAT CONFIDENCE
17 INTERVAL ENCOMPASS ONE OR NOT.

18 THE COURT: RIGHT.

19 MR. JENSEN: SO ANYHOW, THE DOUBLING OF -- I JUST
20 WANTED TO MAKE SURE THE COURT UNDERSTOOD THE DOUBLING OF THE
21 RISK POINT AND THE STATISTICAL SIGNIFICANCE POINTS ARE
22 INDEPENDENT OF ONE ANOTHER. BUT I HAVE NOT COUNTED ALL THAT
23 UP JUST AS DR. HARRISON HAS NOT AND DIDN'T BELIEVE HE EVER
24 NEEDED TO DO THAT. HE DIDN'T DO IT FOR PURPOSES OF THE
25 GARCIA DECLARATION ITSELF.

1 WHAT HE DID DO WAS EVALUATE USING AGAIN HIS SCIENTIFIC
2 JUDGMENT AT THE TIME OF THE GARCIA DECLARATION THAT THAT BODY
3 OF LITERATURE SHOWED A CONSISTENT ASSOCIATION OF INCREASED
4 RISK AMONG OCCUPATIONAL EXPOSURES TO -- PEOPLE WHO HAVE
5 OCCUPATIONAL EXPOSURE TO BENZENE GETTING NON-HODGKIN'S
6 LYMPHOMA. AND ALL OF THOSE STUDIES I BELIEVE OR CERTAINLY
7 WITH SIGNIFICANT MAJORITY OF THEM EVALUATED THAT ASSOCIATION.

8 MANY OF THOSE STUDIES SHOW POSITIVE ASSOCIATIONS. MANY
9 OF THOSE STUDIES SHOW STATISTICALLY SIGNIFICANT POSITIVE
10 ASSOCIATIONS. MANY SHOW -- SOME SHOW -- I -- AGAIN, I CAN'T
11 TELL YOU THE PERCENTAGE. SOME SHOW NO ASSOCIATION. SOME
12 SHOW NONSIGNIFICANT ASSOCIATIONS, POSITIVE ASSOCIATION. BUT
13 ULTIMATELY WHAT DR. HARRISON CONCLUDED WAS THAT THEY ARE IN
14 FACT CONSISTENT.

15 AND LET ME SKIP OVER A COUPLE OF THINGS THAT REALLY DEAL
16 WITH SPECIFIC CAUSATION, I'LL COME BACK TO THEM AND TALK
17 ABOUT CONSISTENCY BECAUSE THAT'S WHAT I'M TALKING ABOUT RIGHT
18 NOW. AND I WANT TO POINT YOU TO A FEW OF THE RELEVANT
19 PARAGRAPHS FROM THE GARCIA DECLARATION WHICH ARE IN THE
20 CONCLUDING SECTIONS WHERE HE'S APPLYING THE BRADFORD HILL
21 GUIDELINES TO WHAT HE HAS SUMMARIZED IN TERMS OF THE STUDIES
22 OVER THE COURSE OF THE DECLARATION.

23 AND ON PARAGRAPH 532 AT PAGE 215 HE SAYS, AS IS SHOWN BY
24 THE MANY CASE CONTROL STUDIES OF PERSONS DIAGNOSED WITH
25 NON-HODGKIN'S LYMPHOMA OR WHO DIED FROM THIS DISEASE, AN

1 ASSOCIATION BETWEEN ORGANIC SOLVENTS AND NON-HODGKIN'S
2 LYMPHOMA IS CONSISTENTLY FOUND AMONG THE STUDIES.

3 AT PARAGRAPH 535 HE SAYS, THE EPIDEMIOLOGIC STUDIES OF
4 WORKERS EXPOSED TO ORGANIC SOLVENTS ARE ALSO QUITE CONSISTENT
5 IN REPORTING EXCESSES OF NON-HODGKIN'S LYMPHOMA. AND YOU
6 KNOW, IN EACH OF THESE PARAGRAPHS HE GIVES MORE DETAIL ABOUT
7 THE BASES FOR SUMMARIZING THAT VIEW WHICH AGAIN IS REALLY
8 BASED ON THE 150 PAGES THAT COME BEFORE IT.

9 BUT -- AND THEN FINALLY AT PARAGRAPH 538 HE SAYS, TAKEN
10 TOGETHER ALONG WITH THE WELL-CONDUCTED CASE CONTROL STUDIES
11 THE EPIDEMIOLOGIC LITERATURE IS CONSISTENT IN REPORTING
12 SIGNIFICANTLY INCREASED RISKS OF NON-HODGKIN'S LYMPHOMA AMONG
13 BENZENE-EXPOSED WORKERS. AND AGAIN, THAT'S ENOUGH TO GET YOU
14 THERE.

15 THE COURT: I GUESS, DO YOU HAVE ANY REASON TO
16 CONTEST THE YAMAHA CHART THAT THEY -- YOU SAID THAT DR.
17 HARRISON AND YOU HAVE NOT GONE THROUGH TO SEE IF EACH OF THE
18 CASE STUDIES WAS BENZENE-SPECIFIC TO NHL OR STATISTICALLY
19 SIGNIFICANT AND -- BUT I THINK THAT YAMAHA DID DO THAT IN ITS
20 MEMORANDUM AT ENTRY NUMBER 287. THERE WERE A COUPLE OF
21 TABLES AT THE END OF THAT WHICH WENT THROUGH EACH OF THE
22 STUDIES AND SAID THAT THE VAST MAJORITY OF THEM WERE NOT
23 BENZENE SPECIFIC AND ONLY TWO OF THE OTHER WORKER STUDIES
24 WERE CONCERNING NHL BUT STATISTICALLY INSIGNIFICANT.

25 SO, I GUESS I'M HAVING A DIFFICULT TIME RECONCILING WHAT

1 YOU JUST SAID ABOUT DR. HARRISON'S POSITION CONCERNING THE
2 CASE STUDIES AND THE CHARTS THAT ARE CONTAINED AS AN
3 ATTACHMENT TO YAMAHA'S MEMO.

4 MR. JENSEN: I APOLOGIZE FOR TURNING MY BACK TO THE
5 COURT WHILE I WAS PULLING THAT UP.

6 THE COURT: PLEASE. BE--

7 MR. JENSEN: I THINK I FOUND THE TABLES THAT ARE --
8 ARE THEY AT PAGES 20 AND 21 --

9 THE COURT: YES, SIR.

10 MR. JENSEN: -- OF THEIR MOTION? OKAY. AND, WELL,
11 IT IS TRUE, YOUR HONOR, THAT COLLECTIVELY THE STUDIES THAT
12 ARE DISCUSSED IN THE GARCIA DECLARATION INCLUDE MANY STUDIES
13 WHERE THE WORKERS WORKED WITH ORGANIC SOLVENTS MORE BROADLY
14 CATEGORIZED AND THERE WERE NOT SPECIFIC MEASUREMENTS OF
15 BENZENE DONE FOR PURPOSES OF THE STUDY.

16 HOWEVER, THE AUTHORS IN MANY OF THOSE STUDIES, I AM NOT
17 GOING TO REPRESENT THAT IT'S ALL OF THEM, BUT MANY OF THOSE
18 STUDIES IN THE DISCUSSION SECTION WHEN THE AUTHORS ARE
19 TALKING ABOUT, OKAY, THERE WAS AN ASSOCIATION BETWEEN WORKERS
20 WORKING WITH ORGANIC SOLVENTS GENERALLY AND DEVELOPING
21 NON-HODGKIN'S LYMPHOMA, HERE'S WHAT THE RELATIVE RISK OR THE
22 ODDS RATIO WAS, AND THEY WILL SAY THAT, YOU KNOW, IT'S --
23 IT'S -- BENZENE HAS BEEN ASSOCIATED WITH SOME STUDIES IN THE
24 EPIDEMIOLOGICAL LITERATURE WITH NON-HODGKIN'S LYMPHOMA IN THE
25 PAST AND THE, YOU KNOW, BENZENE HAS -- IS OFTEN A INGREDIENT

1 OR CONTAMINANT OF ORGANIC SOLVENTS.

2 AND SO, I TELL YOU ALL OF THAT TO SAY THAT THAT
3 LITERATURE INCLUDING THOSE KINDS OF STUDIES THAT ARE LOOKING
4 AT ORGANIC SOLVENTS BROADLY IS PART OF THE LITERATURE THAT
5 MUST BE ANALYZED OR SHOULD BE ANALYZED IN ASSESSING THE ISSUE
6 OF BENZENE AND NHL.

7 THE COURT: BUT IT WASN'T IN DR. GARCIA'S
8 AFFIDAVIT. I GUESS THAT'S WHAT I'M TRYING TO UNDERSTAND IS
9 THAT WE'VE GOT A CHALLENGE TO WHAT HE -- YOU ARE REPRESENTING
10 HE DID EVALUATE THE APPROPRIATE STUDIES. AND YOU KEEP
11 REFERRING TO THE THOROUGH, LONG 200-SOME-ODD PAGE
12 DECLARATION.

13 BUT THE CHALLENGE IS TRYING TO FILTER THROUGH ALL OF THE
14 WHAT -- WHAT YAMAHA CALLS USELESS FILLER MATERIAL DESIGNED TO
15 EXPAND THE DECLARATION TO TRY TO FIND EXACTLY WHAT IT IS THAT
16 IS THE SCIENTIFIC BASIS FOR DR. HARRISON'S OPINION THAT GIVES
17 RISE TO THE GENERAL CAUSATION OPINION OR TESTIMONY THAT THE
18 BENZENE CAUSES NON-HODGKIN'S LYMPHOMA, AND I HAVEN'T HEARD
19 YOU SPECIFICALLY TIE THAT OR IDENTIFY THAT FOR ME IN THE
20 DECLARATION. SO THAT WOULD BE HELPFUL FOR ME.

21 MR. JENSEN: OKAY. WELL, I CAN'T, AS I STAND HERE,
22 TELL YOU WHICH OF THE STUDIES THAT ARE DISCUSSED AND
23 REFERENCED IN THE GARCIA DECLARATION ARE SPECIFIC TO BENZENE
24 VERSUS DEALING WITH ORGANIC SOLVENTS MORE BROADLY. I CAN'T
25 DO THAT.

1 WHAT I CAN DO IS TELL YOU THAT HE ALSO REFERENCED MORE
2 RECENTLY FOR PURPOSES OF THIS CASE THIS STEINMAUS
3 META-ANALYSIS WHICH IS SPECIFICALLY A META-ANALYSIS OF
4 BENZENE STUDIES OF OCCUPATIONAL BENZENE STUDIES. AND YOU
5 KNOW, ONCE YOU COMBINE THAT DATA, IT SHOWS THE STATISTICALLY
6 SIGNIFICANT ELEVATED RISK FOR BENZENE-EXPOSED WORKERS
7 DEVELOPING NON-HODGKIN'S LYMPHOMA.

8 AND IN FACT, WHEN THE AUTHORS LOOKED ONLY AT THOSE
9 STUDIES, THE DATA FROM THOSE STUDIES, THAT I STATED IT WRONG
10 HERE ON THE THING. WHEN THEY ELIMINATED -- NO, I GOT IT
11 RIGHT. WHEN THEY ELIMINATED THE STUDIES THAT RELIED
12 EXCLUSIVELY ON SELF-REPORTED WORK HISTORIES AND SAID, WELL,
13 THAT'S NOT A VERY GOOD WAY OF EVALUATING EXPOSURE, WHEN THEY
14 ELIMINATED THOSE STUDIES AND LOOKED AT WHAT WAS REMAINING,
15 THERE WAS ACTUALLY MORE THAN A DOUBLING OF THE RISK THAT WAS
16 ALSO STATISTICALLY SIGNIFICANT ON THE META-ANALYSIS.

17 AND SO, BASED ON THAT, YOU KNOW, HERE YOU HAVE GOT
18 BENZENE SPECIFICALLY AND NOT JUST A EYEBALL ASSESSMENT OF
19 CONSISTENCY BUT AN ACTUAL QUANTITATIVE ASSESSMENT OF
20 CONSISTENCY THAT'S BEEN PEER REVIEWED AND PUBLISHED IN THE
21 LITERATURE.

22 DO YOU HAVE ANY -- BEFORE I GO ON TO SPECIFIC CAUSATION,
23 YOUR HONOR, I WANT -- WELL, I DO NEED TO ADDRESS THE ISSUE OF
24 MINERAL SPIRITS VERSUS BENZENE.

25 THE COURT: SURE.

1 MR. JENSEN: AND THAT IN THIS CASE -- AND I HAVE
2 READ THE BURST DECISION FROM THE EASTERN DISTRICT OF
3 LOUISIANA THAT MR. MCGOLDRICK SPOKE ABOUT AND I WAS UNABLE TO
4 SEE ANY REFERENCE IN THAT CASE TO A QUANTIFIED ESTIMATE
5 WHETHER FROM MODELING OR ANY OTHER WAY OF ESTIMATING EXPOSURE
6 THAT WAS SPECIFIC TO BENZENE WITH RESPECT TO THAT CLAIM.

7 AND IN THIS CASE BY CONTRAST, DR. STEWART HAS DONE AN
8 EXPOSURE ANALYSIS TO SAY, I AM ESTIMATING THE AMOUNT OF
9 BENZENE CUMULATIVELY THAT MR. BOYKIN WAS EXPOSED TO OVER THE
10 COURSE OF HIS WORK AS A MOTORCYCLE MECHANIC AND I'M GOING TO
11 GIVE YOU A RANGE, A QUANTITATIVE RANGE, BASED ON THE MODELING
12 THAT I HAVE DONE AND THAT REFLECTS HIS BENZENE EXPOSURES.

13 NOW, THE FACT THAT THOSE BENZENE EXPOSURES CAME FROM
14 MINERAL SPIRITS THAT CONTAINED BENZENE IS A MATTER THAT I
15 AGREE IS ABSOLUTELY RIPE FOR CROSS-EXAMINATION. BUT TO SAY
16 THAT THAT REQUIRES AS A MATTER OF LAW THAT IN ORDER FOR DR.
17 HARRISON'S GENERAL CAUSATION TESTIMONY TO BE ADMISSIBLE, HE
18 MUST HAVE EVALUATED WHETHER MINERAL SPIRITS AND NOT BENZENE
19 CAN CAUSE NHL I THINK IT'S JUST WRONG.

20 BENZENE IS BENZENE IS BENZENE REGARDLESS OF WHERE IT
21 CAME FROM. AND THAT'S THE VIEW THAT DR. HARRISON HAS
22 EXPRESSED, AND THE -- THERE'S NO BASIS ON THIS RECORD FOR
23 DEFENDANTS TO SHOW OTHERWISE. SO, THE CHEMICAL AND
24 TOXICOLOGICAL CHARACTERISTICS OF THAT BENZENE DO NOT DEPEND
25 ON WHETHER IT WAS ORIGINALLY PART OF A MIXTURE -- SOLVENT

1 MIXTURE THAT WAS IN MINERAL SPIRITS. THEY JUST DON'T.

2 SO, NOW THEIR EXPERTS WILL COME IN AND SAY IF YOU'VE GOT
3 EXPOSURES TOLUENE AND BENZENE AT THE SAME TIME, YOUR SYSTEM
4 CAN PROCESS BENZENE DIFFERENTLY AND SO FORTH AND SO ON.
5 WELL, OKAY, THEY GET TO DO THAT, BUT THAT'S AGAIN NOT A BASIS
6 THAT -- DR. HARRISON DISAGREES WITH THAT AND THAT'S NOT A
7 BASIS FOR THIS COURT TO EXCLUDE HIS OPINIONS ALTOGETHER
8 BECAUSE HE'S LOOKING AT BENZENE EXPOSURES AND FOCUSING ON
9 THAT.

10 AND THEN, YOU KNOW, THIS KIND OF TURNED -- THIS ARGUMENT
11 IN SOME SENSE TURNS ON ITS HEAD A LITTLE BIT, THE ISSUE THAT
12 YAMAHA RAISES BECAUSE YAMAHA IS SAYING, WELL, A LOT OF THESE
13 STUDIES THAT DR. HARRISON IS REVIEWING IN THE GARCIA
14 DECLARATION ARE NOT BENZENE SPECIFIC. WELL, WHAT ARE THESE
15 STUDIES IF THEY ARE NOT BENZENE SPECIFIC? AND THE REALITY IS
16 THEY ARE STUDIES ABOUT ORGANIC SOLVENTS, PETROLEUM
17 DISTILLATES SOLVENTS SUCH AS AND INCLUDING MINERAL SPIRITS.

18 AND DO ANY OF THOSE STUDIES SAY THAT, YOU KNOW, MINERAL
19 SPIRITS EXPOSURE IS ASSOCIATED -- SPECIFICALLY THAT MINERAL
20 SPIRITS ASSOCIATED WITH NON-HODGKIN'S LYMPHOMA? I'M NOT
21 REPRESENTING THAT THEY DO. I DON'T -- I DON'T KNOW THAT THEY
22 EVEN ANALYZED OR MADE THAT STATISTICAL COMPARISON IN ANY OF
23 THOSE STUDIES. BUT WHAT I DO KNOW IS THAT MANY OF THE
24 STUDIES, WHEN THEY ARE TALKING ABOUT ORGANIC SOLVENT EXPOSURE
25 ARE TALKING ABOUT EXPOSURES TO A GROUP OF SOLVENTS THAT MOST

1 DEFINITELY INCLUDES MINERAL SPIRITS.

2 SO, YOU KNOW, YOU'RE DAMNED IF YOU DO AND YOU'RE DAMNED
3 IF YOU DON'T IS A LITTLE BIT OF WHAT I'M HEARING FROM THESE
4 TWO ARGUMENTS. BUT YOU KNOW, WHAT DR. HARRISON'S JUDGMENT
5 WAS, THAT BECAUSE BENZENE IS CONTAINED IN ORGANIC SOLVENTS
6 THAT ARE PETROLEUM DISTILLATES GENERALLY, THAT ALL THESE
7 STUDIES THAT DEALT WITH THAT ARE RELEVANT BUT THE EXPOSURE OF
8 INTEREST THAT WE'RE TALKING ABOUT WITH RESPECT TO MR. BOYKIN
9 IS BENZENE.

10 AND I'M LOOKING AT THE STUDIES AND EVALUATING GENERAL
11 CAUSATION WITH THAT END POINT IN MIND, CAN BENZENE CAUSE
12 NON-HODGKIN'S LYMPHOMA, AND THERE'S CERTAINLY ENOUGH TO
13 SUPPORT THAT IT CAN.

14 NOW AGAIN, BEFORE I LEAVE THAT ISSUE OF GENERAL
15 CAUSATION, I WANT TO ADDRESS WHATEVER CONCERNS, ISSUES,
16 QUESTIONS THAT YOU HAVE BEFORE I GO ON TO SPECIFIC--

17 *THE COURT:* I THINK I HAVE SUFFICIENTLY INTERRUPTED
18 YOU ALONG THE WAY. I'M NOT SURE THAT I HAVE ANY FOLLOW-UP
19 QUESTIONS. I MIGHT INTERRUPT YOU FURTHER IF SOMETHING COMES
20 TO MIND, BUT YOU HAVE DONE A GREAT JOB SO FAR. PLEASE
21 PROCEED.

22 *MR. JENSEN:* OKAY. OKAY. I THINK THIS IS MY FIRST
23 SORT OF INAPPROPRIATELY-ORDERED SLIDE THAT DEALS WITH ISSUES
24 THAT ARE REALLY SPECIFIC CAUSATION ISSUES. AND YOU KNOW, IN
25 THE CONTEXT OF WESTBERRY, IN THE FOURTH CIRCUIT THAT COURT

1 HAS MADE IT CLEAR THAT PRECISE INFORMATION CONCERNING THE
2 EXPOSURE NECESSARY TO CAUSE SPECIFIC HARMS TO HUMANS AND
3 EXACT DETAILS PERTAINING TO THE PLAINTIFFS' EXPOSURE IS NOT
4 NECESSARY.

5 NOW, YOU DO NEED TO CHARACTERIZE EXPOSURE, YOU NEED TO
6 TAKE EXPOSURE INTO ACCOUNT. AND TO BE FAIR, I'M NOT HEARING
7 THAT SPECIFIC ARGUMENT FROM THE DEFENSE TODAY AT LEAST. BUT
8 I WANT TO MAKE IT CLEAR THAT EVEN THOUGH WE'VE GOT A
9 QUANTITATIVE ESTIMATE OF BENZENE EXPOSURE FROM DR. STEWART IN
10 THIS CASE, IT'S NOT NECESSARY UNDER THE LAW.

11 NOW, THIS ISSUE IS CERTAINLY AT THE HEART OF THIS
12 SPECIFIC CAUSATION ARGUMENT THAT DEFENDANTS ARE MAKING HERE,
13 AND BASICALLY THEY ARE SAYING THAT DR. HARRISON DID NOT DO AN
14 APPROPRIATE DIFFERENTIAL DIAGNOSIS OR DIFFERENTIAL ETIOLOGY
15 KIND OF ANALYSIS IN THIS CASE BECAUSE HE DID NOT ELIMINATE OR
16 EVEN CONSIDER THEY SAY -- EXCUSE ME -- ALL POSSIBLE
17 ALTERNATIVE CAUSES.

18 AND WHAT THE LAW SAYS ABOUT THIS IN -- UNDER WESTBERRY
19 IS THAT A MEDICAL EXPERT'S CAUSATION CONCLUSION SHOULD NOT BE
20 EXCLUDED BECAUSE HE OR SHE HAS FAILED TO RULE OUT EVERY
21 POSSIBLE ALTERNATIVE CAUSE OF A PLAINTIFF'S ILLNESS. AND YOU
22 KNOW, AT ONE POINT AT LEAST IN THE PAPERS AND I THINK ALSO
23 TODAY, SAFETY KLEEN HAS ARGUED THAT, WELL, IN THE CONTEXT OF
24 BENZENE LITIGATION WHERE MANY CASES OF LEUKEMIA AND LYMPHOMA
25 HAVE UNKNOWN CAUSES, WE BELIEVE THAT IN THAT CIRCUMSTANCE A

1 PROPER DIFFERENTIAL DIAGNOSIS MUST EXCLUDE ALL POSSIBLE
2 CAUSES, AND THAT'S -- THAT'S NOT THE LAW IN BENZENE
3 LITIGATION EITHER.

4 AND IF I CAN POINT TO ANOTHER DECISION THAT IS A CASE
5 THAT I HAPPENED TO BE INVOLVED WITH CALLED SCHULTZ VERSUS
6 AKZO NOBEL PAINTS -- AND AGAIN, IN THAT INSTANCE THE DISTRICT
7 COURT HAD EXCLUDED THE SPECIFIC CAUSATION TESTIMONY OF AN
8 EXPERT AND ONE OF THE ARGUMENTS THAT HAD BEEN -- OR ONE OF
9 THE REASONS ARTICULATED BY THE DISTRICT COURT HAD BEEN THAT
10 THE DIFFERENTIAL DIAGNOSIS THAT THAT EXPERT HAD DONE FAILED
11 TO RULE EVERYTHING OUT, ALL POSSIBLE CAUSES OUT. AND ON
12 APPEAL THE SEVENTH CIRCUIT SAID THAT WAS NOT NECESSARY.

13 AN EXPERT -- QUOTE, AN EXPERT SHOULD SHOW WHY A
14 PARTICULAR ALTERNATIVE EXPLANATION IS NOT IN THE EXPERT'S
15 VIEW THE SOLE CAUSE OF THE DISEASE. AND THEN IT GIVES A
16 CITATION. BEYOND THAT, WHILE MYERS AND THE COMMITTEE NOTES
17 SUGGEST THAT A RELIABLE EXPERT SHOULD CONSIDER ALTERNATIVE
18 CAUSES, THEY DO NOT REQUIRE AN EXPERT TO RULE OUT EVERY
19 ALTERNATIVE CAUSE.

20 AND IN THE CONTEXT OF THAT DISCUSSION, THE COURT WENT ON
21 TO DESCRIBE HOW BOTH UNDER THE SUBSTANTIVE LAW AND UNDER THE
22 RECORD OF THE SCIENTIFIC TESTIMONY OF THE EXPERT WHOSE NAME
23 WAS STEVEN GORE, DR. GORE'S TESTIMONY IN THAT CASE. AS A
24 MATTER OF LAW, MORE THAN ONE CAUSE, YOU KNOW, SUBSTANTIVE LAW
25 OF THE STATE OF WISCONSIN, MORE THAN ONE CAUSE CAN CAUSE AN

1 INJURY AND, B, A LEGAL CAUSE FOR WHICH, YOU KNOW, LIABILITY
2 ATTACHES.

3 AND UNDER THE SCIENCE THE COURT POINTS OUT THAT, YOU
4 KNOW, DR. GORE IS SAYING EXACTLY WHAT DR. HARRISON HAS SAID
5 HERE; IS THAT MANY DISEASES AND PROBABLY EVERY CASE OF CANCER
6 HAS MULTIPLE, MULTIPLE CAUSES. AND GIVEN THAT MULTIPLE
7 CAUSES ARE IN PLAY IN THE CASES OF MANY INSTANCES OF CANCER
8 INCLUDING LEUKEMIA, INCLUDING NON-HODGKIN'S LYMPHOMA, IT
9 MAKES NO SENSE TO SAY THAT YOU HAVE TO RULE OUT EVERY OTHER
10 POSSIBLE CAUSE BEFORE YOU CAN RULE IN THAT MORE LIKELY THAN
11 NOT BENZENE EXPOSURE IS PLAYING A ROLE.

12 *THE COURT:* I UNDERSTAND THAT SEVENTH CIRCUIT CASE.
13 BUT THE FOURTH CIRCUIT IN COOPER PROVIDED THAT A DIFFERENTIAL
14 DIAGNOSIS THAT FAILS TO TAKE SERIOUS ACCOUNT OF OTHER
15 POTENTIAL CAUSES MAY BE SO LACKING THAT IT CANNOT PROVIDE A
16 RELIABLE BASIS FOR AN OPINION ON CAUSATION. THUS, IF AN
17 EXPERT UTTERLY FAILS TO CONSIDER ALTERNATIVE CAUSES OR FAILS
18 TO OFFER AN EXPLANATION FOR WHY THE PROFFERED ALTERNATIVE
19 CAUSE WAS NOT THE SOLE CAUSE, A DISTRICT COURT IS JUSTIFIED
20 IN EXCLUDING THE EXPERT'S TESTIMONY.

21 SO HOW DO YOU RECONCILE THAT WITH THE ARGUMENT THAT
22 YOU'RE MAKING?

23 *MR. JENSEN:* WELL, I THINK THAT THE STATEMENTS OF
24 LAW ARE CONSISTENT WITH ONE ANOTHER. IN OTHER WORDS, WHAT
25 THE FOURTH CIRCUIT I THINK IS SAYING IN THE COOPER CASE THERE

1 IS THE EXPERT CAN'T DO A DIFFERENTIAL ETIOLOGY ANALYSIS
2 WITHOUT AT LEAST THINKING ABOUT THE LIKELY POSSIBLE
3 ALTERNATIVE CAUSES AND, YOU KNOW, THINKING ABOUT THEM,
4 CONSIDERING THEM AND DETERMINING WHETHER OR NOT TO RULE THEM
5 IN OR RULE THEM OUT OR DOESN'T HAVE ENOUGH INFORMATION ONE
6 WAY OR THE OTHER.

7 AND IF YOU FAIL TO DO THAT WITH, YOU KNOW, RESPECT TO
8 SOMETHING THAT IS CLEARLY OF SIGNIFICANT, POTENTIAL
9 ALTERNATIVE CAUSE OR CAUSES, THEN, YOU KNOW, YOU'RE NOT DOING
10 IT RIGHT. AND--

11 THE COURT: ISN'T THAT EXACTLY WHAT THE DEFENDANTS
12 ARE SUGGESTING, THAT -- THAT--

13 MR. JENSEN: YES, THAT IS WHAT THEY ARE ARGUING.
14 THEY ARE WRONG ABOUT WHAT DR. HARRISON DID OR DIDN'T DO, BUT
15 THAT IS THEIR ARGUMENT.

16 THE COURT: WAS THERE A SERIOUS ACCOUNT OF THE
17 POTENTIAL CAUSE OF THE NHL FROM PCB'S?

18 MR. JENSEN: YES.

19 THE COURT: OKAY. AND ALL THE OTHER FACTORS, THE
20 PRINTING PRESS AND THE --

21 MR. JENSEN: YES.

22 THE COURT: -- AMBIENT BENZENE AND THE --

23 MR. JENSEN: YES.

24 THE COURT: -- AND THE IDIOPATHIC.

25 MR. JENSEN: SO -- OKAY. IDIOPATHIC IS VERY

1 DIFFERENT FROM ALL THE OTHERS. IDIOPATHIC IS NOT AN
2 ALTERNATIVE CAUSE AS MUCH AS DEFENSE COUNSEL MIGHT LIKE TO
3 COUCH IT THAT WAY. IDIOPATHIC JUST MEANS THERE IS NO CAUSE
4 IDENTIFIED. EVERY CASE OF DISEASE, EVERY CASE OF LYMPHOMA,
5 EVERY CASE OF LEUKEMIA HAS NOT JUST ONE CAUSE BUT MANY
6 CAUSES. BUT IT'S -- IT'S OFTEN THE CASE, IN FACT MORE OFTEN
7 THAN NOT THE CASE THAT WHEN AN INDIVIDUAL DEVELOPS
8 NON-HODGKIN'S LYMPHOMA AND GOES INTO AN ONCOLOGIST, AN
9 ONCOLOGIST GIVES THAT PERSON THE BAD NEWS AND THE PERSON THEN
10 ASKS, OKAY, WHY DID I GET IT? WHAT CAUSED IT?

11 IT'S MORE OFTEN -- MORE THAN HALF THE CASES, IN FACT THE
12 MEDIUM, MAJORITY OF THE CASE THE ONCOLOGIST SAYS, I DON'T
13 KNOW, OKAY, AND THAT CASE THEN GOES DOWN IN THE REGISTRY AS
14 BEING AN IDIOPATHIC NON-HODGKIN'S LYMPHOMA. THAT DOES NOT
15 MEAN THAT IT DIDN'T HAVE A CAUSE.

16 WHAT IT MEANS IS WHOEVER WAS ASSESSING THE EXTENT TO
17 WHICH THEY COULD IDENTIFY A CAUSE OR CAUSES OF THAT LYMPHOMA
18 COULDN'T DO SO BASED ON THE INFORMATION THAT THAT PERSON HAD.

19 *THE COURT:* LET ME ASK YOU THIS. HAS DR. HARRISON
20 EVER TESTIFIED IN A TOXIC TORT CASE THAT THE CAUSE OF
21 NON-HODGKIN'S LYMPHOMA WAS IDIOPATHIC?

22 *MR. JENSEN:* HAS HE EVER TESTIFIED IN A SPECIFIC
23 INDIVIDUAL'S CASE...

24 *THE COURT:* THAT HE COULDN'T IDENTIFY--

25 *MR. JENSEN:* THAT HE COULDN'T SAY -- I DON'T KNOW

1 THE ANSWER TO THAT QUESTION. I DON'T KNOW THE ANSWER.

2 THE COURT: HAS HE EVER TESTIFIED FOR A DEFENDANT?

3 MR. JENSEN: I BELIEVE SO, YOUR HONOR, BUT I...

4 AGAIN, I DON'T WANT TO MAKE A REPRESENTATION I'M NOT SURE
5 ABOUT. I THINK HE HAS, BUT I'M NOT SURE.

6 THE COURT: I GUESS MY ISSUE IS IF HE HIMSELF HAS
7 TESTIFIED THAT THE MAJORITY OF CASES WE DON'T KNOW HOW THE
8 PERSON GOT NHL AND YET EVERY TIME HE DOES TESTIFY HE CAN
9 IDENTIFY, HE'S GOT THE SECRET, SECRET RED TELEPHONE TO GOD
10 THAT TELLS HIM EXACTLY WHY THIS INDIVIDUAL WHO HAS HIRED HIM
11 GOT NON-HODGKIN'S LYMPHOMA.

12 AND SO, I GUESS THAT'S MY ISSUE. IT JUST SO HAPPENS AT
13 THE CAUSATION ANALYSIS -- I'M NOT SURE IF THE ANALYSIS
14 CHANGES BUT THE OPINION CHANGES FROM PERSON TO PERSON JUST
15 DEPENDING ON WHAT HAPPENED IN THAT PERSON'S LIFE, NOT
16 NECESSARILY SPECIFIC TO THE FACTS GERMANE TO THE SCIENCE OR
17 THE MEDICINE BEHIND THE DISEASE.

18 MR. JENSEN: OKAY. I THINK I UNDERSTAND WHERE
19 YOU'RE COMING FROM HERE. AND WHERE I THINK YOU'RE COMING
20 FROM IS TO SAY, LOOK, IT'S NOT CREDIBLE AND IT UNDERMINES
21 RELIABILITY IN SOME BROAD SENSE OF THAT TERM AT LEAST TO THE
22 EXTENT THAT EVEN THOUGH DR. HARRISON, YOU KNOW, MAY
23 ACKNOWLEDGE THAT MOST CASES OF NON-HODGKIN'S LYMPHOMA WE
24 CAN'T IDENTIFY WHAT THE CAUSE IS, WHENEVER I TALK ABOUT
25 NON-HODGKIN'S LYMPHOMA AND CAUSATION I CAN TELL YOU WHAT THE

1 CAUSE IS, AND THAT -- THAT'S NOT CREDIBLE.

2 WELL, I WOULD -- I WILL SAY A COUPLE OF THINGS ABOUT
3 THAT. ON THE ISSUE OF WHETHER HE'S SO BIASED THAT EVERY TIME
4 HE SEES A CASE, HE ATTRIBUTES IT TO BENZENE OR PCB'S OR
5 WHATEVER PLAINTIFFS' LAWYER NEEDS THEM TO ATTRIBUTE IT TO,
6 WELL, THAT'S A GREAT CROSS-EXAMINATION ISSUE. BUT BEYOND
7 THAT, I WANT TO POINT OUT THERE'S A LOT OF SELF-SELECTION
8 GOING ON BEFORE YOU GET TO THE POINT WHERE HE'S BEEN LISTED
9 AS AN EXPERT.

10 IF HE CAN'T -- IF HE'S GOING TO TELL A, YOU KNOW,
11 PLAINTIFF'S LAWYER THAT I CAN'T TELL YOU WHETHER BENZENE OR
12 ANYTHING ELSE CAUSED THIS PARTICULAR CANCER, THEN OBVIOUSLY
13 HE'S NOT GOING TO GET HIRED FOR THAT CASE AND I'M VERY
14 CONFIDENT THAT HE WOULD SAY, YEAH, THERE'S LOTS OF CASES
15 WHERE I HAVE BEEN ASKED TO REVIEW INFORMATION ABOUT A
16 PROSPECTIVE PLAINTIFF OR A CASE THAT'S ON FILE AND SAID, NO,
17 I CAN'T HELP YOU, I CAN'T IDENTIFY OR I CAN'T CONCLUDE
18 WHETHER OR NOT THE EXPOSURE CAUSED THAT PERSON'S DISEASE.
19 I'M CONFIDENT THAT HE WOULD SAY THAT. WHETHER OR NOT HE'S
20 TESTIFIED FOR DEFENDANTS I CAN'T RECALL FOR SURE. I THINK HE
21 HAS.

22 BUT MORE IMPORTANTLY FOR THE EXERCISE THAT YOU ARE
23 HAVING TO GO THROUGH, THAT'S -- THAT'S A JURY ISSUE, NOT A
24 RULE 702 ISSUE. AND--

25 THE COURT: ALL RIGHT. I GUESS IT'S -- IT IS A

1 RULE 702 ISSUE BECAUSE UNDER -- I THINK BECAUSE UNDER THE
2 DAUBERT ADDITIONAL FACTORS, THE PROGENY, IT SAID THE
3 FOLLOWING ADDITIONAL RELIABILITY FACTORS RELEVANT HERE,
4 WHETHER THE OPINION, EXPERT OPINION, WAS DEVELOPED EXPRESSLY
5 FOR THE PURPOSE OF TESTIFYING AND THUS WAS MORE LIKELY TO BE
6 BIASED TOWARD A PARTICULAR RESULT, WHETHER THE EXPERT
7 EMPLOYED THE ANTITHESIS OF SCIENTIFIC METHODOLOGY BY COMING
8 TO A FIRM CONCLUSION FIRST AND THEN DOING RESEARCH TO SUPPORT
9 IT, WHETHER THE EXPERT HAS UNJUSTIFIABLY EXTRAPOLATED FROM AN
10 ACCEPTED PREMISE TO AN UNFOUNDED CONCLUSION, WHETHER THE
11 EXPERT ADEQUATELY ACCOUNTED FOR AND EXCLUDED ALTERNATIVE
12 EXPLANATIONS, WHETHER EPIDEMIOLOGY, CONSIDERED THE BEST
13 EVIDENCE OF GENERAL CAUSATION IN A TOXIC TORT CASE, WAS
14 AVAILABLE, WAS PROPERLY ADDRESSED BY THE EXPERT OR WAS
15 IMPROPERLY IGNORED.

16 SO, THESE -- AND THESE ARE A LOT OF FACTORS THAT WERE --
17 THE ARGUMENT THAT I'M HEARING IS, DON'T YOU WORRY ABOUT IT,
18 LET THE JURY DECIDE THE WEIGHT TO GIVE IT. IT'S SUFFICIENT
19 FOR YOU, IT'S A JURY QUESTION. AND I DON'T THINK THAT THAT'S
20 WHAT THE LAW REQUIRES.

21 I THINK THE LAW REQUIRES THE COURT TO SERVE IN ITS
22 GATEKEEPING FUNCTION TO DETERMINE WHETHER WE HAVE GOT A HIRED
23 GUN OR WHETHER WE HAVE GOT TRULY AN EXPERT WHO HAPPENS TO BE
24 BROUGHT IN FOR THE PURPOSE OF AIDING THE JURY IN MAKING A
25 DETERMINATION ON SCIENTIFIC MATTERS.

1 MR. JENSEN: IT IS TRUE THAT AT LEAST IN SOME CASES
2 COURTS HAVE SAID THAT THE ISSUES ABOUT THE EXTENT TO WHICH
3 THE OPINIONS WERE PREPARED FOR LITIGATION SPECIFICALLY IS
4 SOMETHING THAT THE COURT SHOULD TAKE INTO ACCOUNT UNDER 702
5 AND THAT, YOU KNOW, YOU CAN CHARACTERIZE THAT AS BEING A PART
6 OF THIS SO-CALLED WHETHER THEY ARE A HIRED-GUN ANALYSIS.

7 BUT TO SUGGEST AS I -- YOU KNOW, I DON'T WANT TO PUT
8 WORDS IN THE COURT'S MOUTH, BUT WHAT I JUST HEARD -- I THINK
9 I HEARD YOU SAY IS IF -- IF I LOOK AT THIS RECORD AND I
10 DETERMINE FROM A TOTALITY OF THIS RECORD THAT DR. HARRISON IS
11 A QUOTE, HIRED GUN, THEN REGARDLESS OF WHETHER HE APPLIED,
12 YOU KNOW, A SCIENTIFICALLY APPROPRIATE METHODOLOGY, BECAUSE
13 HE'S A HIRED GUN, I CAN THROW HIM OUT AND I HAVE DISCRETION
14 TO DO THAT.

15 THE COURT: I'M NOT SAYING THAT. I'M SAYING THAT'S
16 ONE FACTOR THAT THE COURT MUST CONSIDER. NOW, THE OTHER
17 DAUBERT FACTORS I THINK ARE ALSO RELEVANT ABOUT WHETHER THERE
18 IS SCIENTIFIC SUPPORT, IS IT A THEORY GENERALLY ACCEPTED,
19 WHAT'S THE MINIMUM RATE OF ERROR, YOU KNOW, ALL OF THE -- THE
20 HARD SCIENCE AND THE EPIDEMIOLOGICAL STUDIES, IF THAT'S THE
21 APPROPRIATE THING TO CONSIDER UNDER THE DIFFERENTIAL
22 ETIOLOGY.

23 BUT I GUESS THE ISSUE THAT I'M HAVING TO DEAL WITH IS IN
24 ANALYZING ALL OF THESE DIFFERENT FACTORS THAT GO INTO MAKING
25 A DETERMINATION UNDER 701 AS TO WHETHER THE EXPERT IS

1 RELIABLE AND WHETHER THERE'S A SCIENTIFIC BASIS FOR -- FOR
2 HIS DETERMINATION THAT WOULD ASSIST THE TRIER OF FACT WHEN
3 THERE'S CHALLENGES TO ONE AFTER ANOTHER AFTER ANOTHER AFTER
4 ANOTHER OF THOSE FACTORS THAT THE COURT MUST CONSIDER.

5 AT SOME POINT IT BECOMES A QUESTION OF WHAT'S LEFT, YOU
6 KNOW, WHAT IS NOT BEING CHALLENGED, WHAT IS OKAY? I MEAN,
7 HE'S -- IN FACT, I THINK THAT THERE'S NO CHALLENGE TO HIS
8 QUALIFICATIONS OR THE METHODOLOGY THAT HE CHOSE, BUT I THINK
9 EVERYTHING ELSE I'M HEARING IS ALMOST FAIR GAME. ALL THE
10 OTHER FACTORS THAT I'M TO CONSIDER THEY'RE BEING
11 CHALLENGED -- THERE ARE CHALLENGES TO.

12 AND I THINK FOR THE ALTERNATIVE CAUSES ASPECT, I HAVE
13 TRIED TO -- I TRIED TO COME UP WITH A WAY THAT I CAN
14 UNDERSTAND IT BECAUSE IT SEEMS VERY FLUID AND POTENTIALLY
15 CONFUSING, BUT I -- I WAS TALKING WITH MY LAW CLERK AND I
16 SAID, OKAY, WELL, YOU KNOW, I HAVE GOT FOUR BOYS. I HAVE GOT
17 A DECK OUTSIDE. IF I SEE -- IF I PLACE LET'S SAY A GLASS OF
18 MILK ON MY DECK, BACK DECK PORCH, AND THEN I COME BACK AND I
19 SEE THE GLASS IS SHATTERED AND THERE'S MILK ALL OVER MY DECK,
20 THEN I CAN IN MY MIND THINK, ALL RIGHT, I HAVE GOT FOUR BOYS,
21 ONE OF THE FOUR OF THEM PROBABLY BROKE THE GLASS --

22 MR. JENSEN: RIGHT.

23 THE COURT: -- SPILLED IT, KNOCKED IT OVER OR
24 SOMETHING. AND I SAY, ALL RIGHT, WELL, I'M GOING TO TALK TO
25 MY OLDEST AND SEE WHAT HE SAYS. AND I TALK TO HIM AND HE

1 SAYS, OH, IT WAS THE BABY THAT DID IT. AND THEN I SAY, WELL,
2 I'M GOING TO ELIMINATE MY OLDEST BECAUSE HE SAID HE DIDN'T DO
3 IT AND, YOU KNOW WHAT, I'M JUST GOING TO GO WITH IT, THE BABY
4 DID IT. AND I DON'T GO AND TALK TO MY SECOND CHILD, I DON'T
5 TALK TO MY THIRD CHILD, AND I DON'T TALK TO MY FOURTH CHILD.
6 WHEN, IF I -- AND THAT'S MY OPINION. AND THAT'S THE OPINION
7 THAT I'M GOING TO GIVE AS THE CAUSATION FOR THE SPILL.

8 NOW, WHAT I HAVEN'T CONSIDERED BUT WHAT SOMEONE ELSE,
9 LIKE MY HUSBAND, MIGHT COME IN AND SAY IS, WELL, WHAT ABOUT
10 THE DOG OR THE OTHER DOG OR THE CAT OR, YOU KNOW, THESE
11 GLASSES THAT WE HAVE, THERE HAVE BEEN STUDIES THAT THEY
12 SPONTANEOUSLY COMBUST FOR NO REASON AT ALL, AND IN THE
13 MAJORITY OF CASES WHEN THERE IS A BREAK, IT'S BECAUSE OF NO
14 REASON AT ALL. OKAY?

15 AND SO WHAT I'M HAVING DIFFICULTY IN TRYING TO EVALUATE
16 IS AN EXPERT OPINION OF WHO SPILLED THE GLASS, WHY, WHY THE
17 GLASS IS BROKEN AND MILK IS ALL OVER THE PLACE. I'M TRYING
18 TO MAKE SURE THAT IN ASSESSING THAT OPINION OF CAUSATION, WE
19 FILE -- WE FOLLOW WHAT THE LAW PROVIDES IN TRYING TO EVALUATE
20 ALL POTENTIAL CAUSES --

21 MR. JENSEN: AND YOU SHOULD.

22 THE COURT: -- OF THAT INSTEAD OF SAYING, OKAY,
23 WELL, MY EXPERT CHOSE TO FOCUS ON THE FOUR CHILDREN. DO YOU
24 UNDERSTAND THAT?

25 MR. JENSEN: I THINK I DO. I THINK IT'S A GOOD

1 ANALOGY OR AT LEAST, YOU KNOW, ALL ANALOGIES HAVE SOME
2 PROBLEM --

3 THE COURT: YEAH. BUT--

4 MR. JENSEN: -- BUT I LIKE THE ANALOGY. I THINK
5 YOU SHOULD BE DOING THAT. AND I THINK THAT WE'RE -- YOU AND
6 I ARE ON DIFFERENT PAGES RIGHT AT THIS SECOND. I HOPE I CAN
7 CHANGE YOUR MIND.

8 THE COURT: WELL, I GUESS MY MAIN PROBLEM--

9 MR. JENSEN: GET TO THE SPECIFICS OF--

10 THE COURT: MY MAIN ISSUE IS THE SUGGESTION THAT MY
11 HUSBAND MAKES THAT IN MOST -- IN THE MAJORITY OF GLASS
12 BREAKAGE CASES WE DON'T KNOW WHAT HAPPENED, YOU KNOW, AND
13 THERE'S NO -- THERE'S NO CAUSE THAT WE CAN POINT TO. THERE'S
14 NO CHILD AND NO ANIMAL THAT WE CAN POINT TO.

15 AND IF I DECIDED THAT MY BABY DID IT, THEN BECAUSE I
16 DECIDED THE BABY DID IT DOES NOT MAKE IT CHANGE THE
17 POSSIBILITY THAT THE GLASS SPONTANEOUSLY COMBUSTED. BECAUSE
18 I'VE CHOSEN TO BELIEVE THE BABY DID IT IPSE DIXIT DOESN'T
19 MAKE IT THAT I CAN RULE OUT THE POSSIBILITY OF THE
20 SPONTANEOUS COMBUSTION.

21 MR. JENSEN: WELL, I WOULD SAY THIS, YOUR HONOR. I
22 MEAN, I THINK IT WOULD HAVE BEEN APPROPRIATE IN THAT
23 SITUATION TO CARRY THE ANALOGY OUT, YOU KNOW, FOR YOU TO TALK
24 TO ALL FOUR KIDS, NUMBER ONE. NUMBER TWO, TO CONSIDER OTHER
25 POSSIBLE CAUSES BESIDES SPONTANEOUS BREAKAGE OF GLASS AND

1 DETERMINE THE EXTENT TO WHICH YOU CAN RULE IN, RULE OUT,
2 DON'T HAVE ENOUGH INFORMATION ONE WAY OR THE OTHER, AND
3 ASSESS WHAT'S THE MOST PROBABLE EXPLANATION IN LIGHT OF ALL
4 OF THAT INCLUDING SAYING, I CAN'T SAY. OKAY. I AGREE WITH
5 ALL OF THAT. I DO THINK THAT'S WHAT DR. HARRISON HAS DONE BY
6 ANALOGY HERE.

7 NOW, THE ONE PLACE THAT I HEAR YOU HAVING TROUBLE WHERE
8 I DON'T THINK YOU SHOULD BE IS ON THIS ISSUE OF THE SO-CALLED
9 IDIOPATHIC OR IN THE ANALOGY THE SPONTANEOUS BREAKAGE. THERE
10 IS NO SPONTANEOUS BREAKAGE WHEN IT COMES TO LYMPHOMA. IN
11 OTHER WORDS, NO EXPERT IS GOING TO COME AND SAY ON THE
12 DEFENSE SIDE THAT, YOU KNOW, LYMPHOMA CAN HAPPEN WITHOUT A
13 CAUSE AT ALL. THEY WILL NOT SAY THAT.

14 NOW, WHAT THEY MEAN BY IDIOPATHIC IS JUST NO CAUSE HAS
15 BEEN IDENTIFIED. AND YOU KNOW--

16 *THE COURT:* SO YOU ARE SAYING THERE'S ALWAYS A
17 CAUSE. IT'S WHETHER YOU KNOW--

18 *MR. JENSEN:* THERE'S ALWAYS A CAUSE WHETHER IT'S
19 GENETICS, A COMBINATION OF GENETICS AND ONE ENVIRONMENTAL
20 EXPOSURE, A COMBINATION OF GENETICS IN MULTIPLE ENVIRONMENTAL
21 EXPOSURE -- USING ENVIRONMENTAL IN THE BROADEST TERMS -- THAT
22 WOULD INCLUDE, YOU KNOW, THINGS LIKE SMOKING CIGARETTES OR
23 DRINKING ALCOHOL OR, YOU KNOW, AND SOME OF THOSE THINGS ARE
24 NOT RISK FACTORS FOR NON-HODGKIN'S LYMPHOMA, BUT JUST TO --
25 AS A WAY OF EXPLANATION.

1 AND YOU KNOW, RISK FACTORS MIGHT BE, YOU KNOW, YOUR BMI
2 OR SOMETHING LIKE THAT. AND THERE'S ALWAYS CAUSES. IT'S
3 JUST THAT IN THE MAJORITY OF CASES, WHOEVER IS -- WHOEVER IS,
4 YOU KNOW, BEING ASKED THE QUESTION WITH RESPECT TO SPECIFIC
5 CASES WHEN IT COMES TO NON-HODGKIN LYMPHOMA PATIENTS, AND
6 USUALLY THAT'S TREATING ONCOLOGISTS, DON'T KNOW. THEY DON'T
7 KNOW WITH RESPECT TO THAT SPECIFIC PATIENT.

8 THEY GO DOWN A LIST OF ESTABLISHED RISK FACTORS. THEY
9 DO A ORAL HISTORY OF THE PATIENT TO EVALUATE THE EXTENT TO
10 WHICH ANY OF THOSE RISK FACTORS APPLY, AND MOST OF THE TIME
11 THEY DON'T. OKAY? THAT'S WHAT HAPPENS. NOW, THAT DOESN'T
12 MEAN THAT THAT -- THOSE NON-HODGKIN'S LYMPHOMA PATIENTS
13 DEVELOPED -- DEVELOPED NON-HODGKIN'S LYMPHOMA FOR NO REASON.
14 IT JUST MEANS THAT ONCOLOGIST, THOSE ONCOLOGISTS COULDN'T
15 IDENTIFY THE REASONS.

16 AND COUPLE OF THINGS. NUMBER ONE, TREATING ONCOLOGISTS,
17 ALTHOUGH THEY ARE ALMOST ALWAYS ASKED BY THEIR PATIENTS, WHAT
18 CAUSED MY CANCER, THEY ARE NEITHER PAID NOR TRAINED TO
19 EVALUATE CAUSATION. THAT'S NOT THEIR JOB. THEIR JOB IS TO
20 DIAGNOSE AND TO TREAT AND MAKE PEOPLE BETTER AND THAT'S WHAT
21 THEY DO, THAT'S WHAT THEY ARE PAID FOR, THAT'S WHAT INSURANCE
22 COMPANIES REIMBURSE THEM TO DO.

23 OCCUPATIONAL AND ENVIRONMENTAL MEDICINE DOCTORS LIKE DR.
24 ROBERT HARRISON, THEIR JOB IS TO PREVENT DISEASE AND TO
25 EVALUATE AN INDIVIDUAL'S WHO HAVE DISEASE, WHAT CAUSED IT IF

1 THEY CAN. AND THEY GO THROUGH A PROCESS THAT IS A
2 COMPREHENSIVE PROCESS FOR EVALUATING AND INVESTIGATING
3 CAUSATION THAT MOST TREATING ONCOLOGISTS DO NOT DO AND THEY
4 DON'T HAVE ANY REASON TO DO IT. THEY ARE NOT GOING TO TREAT
5 A NON-HODGKIN'S LYMPHOMA DIFFERENTLY DEPENDING ON WHETHER
6 BENZENE CAUSED IT OR NOT. IT DOESN'T MAKE ANY DIFFERENCE TO
7 THE TREATMENT OPTIONS AVAILABLE.

8 SO, IN LIGHT OF THAT, YOU KNOW, DR. HARRISON IS -- IS IN
9 A, YOU KNOW, VERY SPECIALIZED GROUP OF PHYSICIANS WHO DO THIS
10 FOR A LIVING. AND MOST TIMES WHEN PEOPLE ARE TRYING TO
11 EVALUATE CAUSES, THEY DO IT IN A MUCH LESS THOROUGH FASHION
12 THAN WHAT HE'S TRAINED TO DO AND WHAT HE HAS DONE.

13 BUT EVEN MORE IMPORTANTLY, ONCE SOMEONE HAS GONE THROUGH
14 AN INVESTIGATION, HOWEVER THOROUGH OR NOT THOROUGH IT IS AND
15 THEY HAVE RULED IN THAT, YUP, HERE'S A RISK FACTOR FOR YOU,
16 YOU -- YOU WERE EXPOSED TO CHEMOTHERAPEUTIC AGENTS THAT
17 INCREASED THE RISK OF NON-HODGKIN'S LYMPHOMA BECAUSE YOU HAD
18 BREAST CANCER BEFORE AND THAT CHEMOTHERAPY MORE LIKELY THAN
19 NOT CONTRIBUTED TO YOUR NON-HODGKIN'S LYMPHOMA.

20 ONCE YOU HAVE DONE THAT AND YOU HAVE RULED SOMETHING IN
21 BECAUSE IT'S A RISK FACTOR UNDER THE LITERATURE, UNDER THE
22 GENERAL CAUSATION LITERATURE, YOU HAVE NOW ELIMINATED
23 IDIOPATHIC AS A CAUSE. NOW, YOU COULD BE WRONG. YOU KNOW,
24 YOU COULD BE WRONG ABOUT WHETHER THAT CHEMOTHERAPY WAS A
25 CAUSE.

1 BUT WHAT YOU HAVE DONE BY EXERCISING YOUR JUDGMENT TO
2 RULE THAT FACTOR IN IS RULE OUT THAT IDIOPATHIC IS THE CAUSE,
3 AND THAT'S WHAT HAPPENED HERE IN THE CONTEXT OF DR. HARRISON
4 SAYING, OKAY, I'VE EVALUATED THE AGGREGATE CUMULATIVE
5 EXPOSURES TO BENZENE THAT MR. BOYKIN HAD AND RULED IN THAT
6 MORE LIKELY THAN NOT TO A REASONABLE DEGREE OF MEDICAL
7 CERTAINTY THAT THOSE EXPOSURES PLAYED A ROLE IN THE
8 DEVELOPMENT OF HIS LYMPHOMA. SUBSTANTIAL FACTOR. SO I HAVE
9 RULED OUT IDIOPATHIC.

10 NOW LET'S TALK ABOUT THE OTHER STUFF. THE OTHER STUFF
11 THAT MR. MCGOLDRICK RAISES TODAY IN TERMS OF POSSIBLE
12 ALTERNATIVE CAUSES DEALS WITH -- MOST OF THEM DEALT WITH
13 OTHER TYPES OF EXPOSURES OR ROUTES OF EXPOSURES TO BENZENE.
14 AND LET'S BE CLEAR. DR. HARRISON'S OPINION IS THAT BENZENE
15 CAUSED HIS LYMPHOMA AND ALL OF HIS EXPOSURES TO BENZENE
16 PROBABLY CONTRIBUTED TO THAT. THAT'S HIS OPINION.

17 SO, HIS EXPOSURES WHEN HE WORKED AS A PRINTER PROBABLY
18 CONTRIBUTED. HIS EXPOSURES TO AMBIENT BENZENE, HIS EXPOSURES
19 WHILE PUMPING GAS, ALL OF THOSE PROBABLY CONTRIBUTED. THAT'S
20 DR. HARRISON'S OPINION, BUT, YOU KNOW, THAT EACH OF THOSE
21 EXPOSURES INCLUDING THE OCCUPATIONAL EXPOSURES CONTRIBUTED,
22 AND THEREFORE HE'S NOT RULING THOSE OUT. HE'S RULING THEM
23 ALL IN.

24 NOW, WHAT HE HAS DONE IS SAY, MORE LIKELY THAN NOT, I
25 DON'T THINK, FOR EXAMPLE, THE PRINTING EXPOSURES ARE THE SOLE

1 CAUSE. AND THAT'S WHAT HE'S GOT TO BE ABLE TO DO. IF THAT'S
2 AN EXPOSURE, WHICH IN THIS CASE IT IS, THAT NO LIABILITY
3 COULD EXTEND TO THE DEFENDANTS AS BEING RESPONSIBLE FOR THOSE
4 PRINTING EXPOSURES TO BENZENE, THEN HE HAS TO BE ABLE TO RULE
5 OUT THAT THOSE EXPOSURES WERE THE SOLE CAUSE.

6 THAT'S WHAT HIS LEGAL BURDEN IS. AND HE HAS TO -- HE
7 HAS TO GIVE IT SOME THOUGHT IS THE OTHER THING THAT THE
8 COOPER CASE BRINGS UP; RIGHT? HE CAN'T JUST NOT CONSIDER IT
9 AT ALL IF IT'S A, YOU KNOW, POSSIBLE EXPLANATION. AND SO HE
10 HAS CONSIDERED IT. HE SAID, I CAN'T RULE IT OUT COMPLETELY
11 WITH A HUNDRED PERCENT CERTAINTY THAT THAT WAS THE SOLE
12 CAUSE, BUT I CAN'T SAY IT'S NOT LIKELY, AND THAT'S HIS
13 THAT'S -- HIS RESPONSIBILITY, THAT'S THE BURDEN OF PROOF, AND
14 THAT'S WHAT HE HAS DONE.

15 THAT'S TRUE. SO AGAIN, HE HAS RULED OUT -- BY RULING IN
16 HIS OCCUPATIONAL EXPOSURES TO BENZENE AS A MOTORCYCLE
17 MECHANIC HE'S RULED OUT THAT ANY OF THESE OTHER THINGS WERE
18 THE SOLE CAUSE, BUT HE'S CONSIDERED THE AMBIENT EXPOSURES TO
19 BENZENE, THE PRINTING EXPOSURES, THE GAS EXPOSURES, HE'S
20 CONSIDERED ALL THAT. HE WOULD CONSIDER ALL OF THEM. HE
21 WOULD RULE ALL OF THOSE IN MORE LIKELY THAN NOT AS PROBABLE
22 CONTRIBUTORS BUT SAY IT'S UNLIKELY THAT ANY ONE OF THEM OR
23 ANY OTHER GROUP OF THEM OUTSIDE OF THE MOTORCYCLE MECHANIC
24 CONTEXT WERE THE SOLE CAUSE.

25 SO THAT'S WHAT HE'D SAY ABOUT THE BENZENE EXPOSURE. NOW

1 PCB IS THE OTHER THING THAT'S COME UP. DR. HARRISON'S
2 OPINION IS THAT PEOPLE IN THE GENERAL POPULATION CAN AND DO
3 DEVELOP NON-HODGKIN'S LYMPHOMA AS A RESULT OF HAVING ELEVATED
4 LEVELS OF CERTAIN PCB'S IN THEIR BODY. AND YOU KNOW, WHAT HE
5 WOULD SAY IS IN ORDER TO EVALUATE WHETHER PCB'S CONTRIBUTED
6 TO ANY GIVEN INDIVIDUALS -- AND HE SAYS THIS EXPRESSLY IN
7 BOTH HIS AFFIDAVIT AND HIS DEPOSITION TESTIMONY -- TO
8 EVALUATE THAT IN ANY GIVEN INDIVIDUAL WHO HAS NHL, WHAT YOU
9 NEED TO DO IS DRAW THEIR BLOOD, ANALYZE IT FOR PCB'S, SOME
10 SPECIFIC PCB'S THAT HAVE BEEN ASSOCIATED WITH AN NHL IN THE
11 LITERATURE AND SEE WHETHER THOSE LEVELS ARE, YOU KNOW,
12 CONSISTENT OR NOT WITH THEM BEING AT HIGHER RISK OF
13 DEVELOPING NON-HODGKIN'S LYMPHOMA FROM THOSE BLOOD LINES.

14 AND IN THE ABSENCE OF THOSE BLOOD ANALYSES YOU CAN'T SAY
15 ONE WAY OR THE OTHER BECAUSE SOME PEOPLE IN THE GENERAL
16 POPULATION, EVEN WITHOUT OCCUPATIONAL EXPOSURES TO PCB'S IN
17 DR. HARRISON'S OPINION BASED ON THE LITERATURE ARE DEVELOPING
18 NHL'S AS A RESULT.

19 WITH RESPECT TO MR. BOYKIN, BY THE TIME WE CONTACT DR.
20 HARRISON TO ASK HIM TO EVALUATE WHETHER BENZENE PLAYED A ROLE
21 IN MR. BOYKIN'S DEATH AND HIS DEVELOPMENT OF NHL, HE WAS
22 ALREADY GONE, SO YOU CAN'T DRAW HIS BLOOD AT THAT POINT, AND
23 SO THAT'S ALL -- THAT'S ALL HE'S SAYING ABOUT PCB'S. YES,
24 IT'S A POSSIBLE CONTRIBUTOR. I CAN'T COMPLETELY RULE IT OUT
25 BECAUSE I DIDN'T HAVE ANY BLOOD AVAILABLE. I WILL TELL YOU,

1 HOWEVER -- AND THIS IS IN HIS AFFIDAVIT -- THAT EVEN IF HIS
2 LEVELS WERE ANALYZED AND WERE FOUND TO BE ELEVATED, THAT
3 WOULD NOT CHANGE MY OPINION THAT BENZENE ALSO PLAYED A ROLE.
4 AT THAT POINT I'D BE SAYING IT WAS BOTH BENZENE AND PCB.

5 *THE COURT:* OKAY.

6 *MR. JENSEN:* SO, YOU KNOW, THAT'S WHAT HE DID. HE
7 DID IT WITH RESPECT TO ALL OF THE RISK FACTORS THAT HE
8 BELIEVES ARE STRONGLY ASSOCIATED WITH NON-HODGKIN'S LYMPHOMA.
9 HE CONSIDERED THEM. HE ANALYZED THEM. AND HE RULED OUT WITH
10 RESPECT TO ALL OF THEM THAT ANY OF THEM WERE LIKELY TO BE THE
11 SOLE CAUSE OF MR. BOYKIN'S NON-HODGKIN'S LYMPHOMA, AND THAT'S
12 ALL HE WAS REQUIRED TO DO UNDER THE LAW.

13 WE HAVE BEEN OVER THIS. WE HAVE BEEN OVER THAT. OKAY.
14 THE LAST THING I WANT TO TALK ABOUT, YOUR HONOR, IS MR.
15 MCGOLDRICK WANTED TO SAY OR ARGUED THAT BECAUSE DR.
16 HARRISON'S OPINION IS THAT THERE IS NO SAFE THRESHOLD OF
17 EXPOSURE TO BENZENE CANNOT CAUSE CANCER. AND THAT IS HIS
18 OPINION. THAT'S NOT AN INACCURATE CHARACTERIZATION OF HIS
19 OPINION.

20 THAT BECAUSE THAT'S TRUE, YOU KNOW, HE SHOULD RULE IN
21 EVERYTHING IN THAT KIND OF ANALYSIS OR HE CAN RULE IN
22 EVERYTHING AND THAT'S WHAT HE'S DEPENDED UPON, THAT KIND OF
23 LINEAR, NO THRESHOLD EXPOSURE, ANY EXPOSURE IS GOOD ENOUGH,
24 THEREFORE THIS DISEASE MUST BE CONNECTED TO BENZENE IS
25 SOMETHING THAT HAS BEEN REJECTED BY FEDERAL COURTS AND HE

1 CITES THOSE CASES AND YOU SHOULD REJECT HIS OPINION FOR THE
2 SAME REASONS.

3 EVEN -- AND WHAT I'D HAVE TO SAY TO YOU -- EVEN THOUGH
4 IT IS TRUE THAT IT IS -- HIS OPINION THERE'S NO SAFE
5 THRESHOLD, HE DID NOT RELY ON THE NO SAFE THRESHOLD PORTION
6 OF HIS OPINION TO REACH A SPECIFIC CAUSATION ANALYSIS OR
7 JUDGMENT WITH RESPECT TO MR. BOYKIN. RATHER, WHAT HE DID WAS
8 LOOK AT THE EPIDEMIOLOGICAL LITERATURE THAT HAS STUDIED THE
9 RELATIONSHIP BETWEEN BENZENE AND OTHER ORGANIC SOLVENTS
10 EXPOSURES AND THE RISK OF NON-HODGKIN'S LYMPHOMA AND COMPARE
11 THAT EXPERIENCE BOTH IN TERMS OF WHERE IT WAS AVAILABLE
12 QUANTITATIVE EXPOSURES AND WHERE IT WASN'T JUST DESCRIPTIVE
13 CHARACTERIZATIONS OF THE KINDS OF EXPOSURE CONDITIONS THAT
14 THOSE PEOPLE HAD IN THE WORK PLACE AND COMPARED THAT WITH
15 WHAT MR. BOYKIN DID.

16 AND WHAT HE DETERMINED WAS THAT BASED ON THE LITERATURE,
17 MR. BOYKIN'S WORK EXPERIENCE WITH BENZENE WAS ENOUGH TO PUT
18 HIM AT INCREASED RISK OF NON-HODGKIN'S LYMPHOMA AND THEREFORE
19 I THINK IT PLAYED A ROLE IN HIS PARTICULAR CASE. AND THAT'S
20 VERY DIFFERENT FROM SAYING BECAUSE HE HAD ANY EXPOSURE AT
21 ALL, I -- AND THERE'S NO SAFE THRESHOLD, THAT BENZENE CAUSED
22 IT. DOES THAT MAKE SENSE?

23 THE COURT: YEAH.

24 MR. JENSEN: OKAY. THAT'S ALL I HAVE GOT TO SAY.

25 THE COURT: ALL RIGHT. VERY GOOD. ANY REDIRECT?

1 MRS. BONNEVILLE: CAN I JUST RAISE TWO QUICK POINTS
2 JUST ON THE SPECIFIC CAUSATION ISSUE?

3 THE COURT: SURE.

4 MRS. BONNEVILLE: ANY GENERAL CAUSATION I WILL
5 LEAVE THAT TO MY COLLEAGUES. ONE OF THE THINGS I HEARD MANY
6 TIMES FROM PLAINTIFFS' COUNSEL IS HOW THOROUGH A JOB DR.
7 HARRISON DID, WHAT A COMPREHENSIVE EVALUATION HE DID. AND MY
8 QUESTION, RESPONSE IS, WHERE IS THAT? IT'S NOT IN THE
9 265-PAGE REPORT THAT WE HAVE OUT OF GARCIA. IT'S NOT IN HIS
10 EXPERT REPORT IN THIS CASE. IT'S NOT IN HIS DEPOSITION.

11 THE FIRST TIME WE SEE ANY EVALUATION -- AND I WOULD NOT
12 CHARACTERIZE IT AS COMPREHENSIVE -- BUT THE FIRST TIME WE SEE
13 ANY REAL SERIOUS CONSIDERATION OF ANY OF THE FACTORS IS IN
14 THE AFFIDAVIT IN OPPOSITION TO OUR MOTION. AND AS PART OF
15 ACUITY'S MOTION AT LEAST, AND I'M CERTAINLY NOT AS FAMILIAR
16 WITH SAFETY KLEEN'S MOTION AS THEY ARE, THAT'S PART OF OUR
17 CHALLENGE AND THAT LEAVES US BACK TO WHERE WE WERE THIS
18 MORNING. I DON'T WANT TO REVISIT ANY OF THAT.

19 BUT WHAT WE HAVE HERE IS A CIRCULAR ARGUMENT.
20 PLAINTIFFS CITE TO THEIR AFFIDAVIT. THEY DON'T CITE TO THE
21 DEPOSITION TESTIMONY. THEY DON'T CITE TO THE REPORT. THE
22 AFFIDAVIT DOESN'T CITE TO THE DEPOSITION TESTIMONY THAT
23 HAPPENED OVER TWO DAYS. IT DOESN'T CITE TO THE REPORT.
24 DOESN'T CITE TO STUDIES.

25 AND SO, THAT IS PART OF ONE OF OUR FUNDAMENTAL PROBLEMS

1 WITH DR. HARRISON IS THAT THE ONLY TIME HE COMES CLOSE TO
2 APPLYING A DIFFERENTIAL METHODOLOGY IN ANY WAY THAT WOULD BE
3 CLOSE TO THE STANDARD OF WHAT THE LAW REQUIRES FROM HIM IS IN
4 RESPONSE TO OUR MOTION. YOU CAN'T SAY THAT HE RULED OUT A
5 CAUSE WHEN HE NEVER CONSIDERED IT IN THE FIRST PLACE.

6 HIS RULE 26 REPORT, HIS DEPOSITION TESTIMONY, IT'S CLEAR
7 HE DID NOT SERIOUSLY CONSIDER IT. AND I THINK THE COURT HAS
8 IT RIGHT ON THE MONEY. THE COURT HAS PLENTY OF AUTHORITY
9 UNDER DAUBERT, UNDER WESTBERRY, UNDER COOPER. THE COURT DOES
10 NOT NEED TO LOOK TO MILWARD IN THE FIRST CIRCUIT. IT DOES
11 NOT NEED TO LOOK TO SEE WHAT SCHULTZ IN WISCONSIN IS DOING.

12 THE FOURTH CIRCUIT IN WESTBERRY AND COOPER LAYS OUT
13 WHAT'S REQUIRED IN A DIFFERENTIAL DIAGNOSIS. SOUTH CAROLINA
14 AND FOURTH CIRCUIT CASE LAW INTERPRETING DAUBERT IS CLEAR ON
15 HOW THE COURT EXERCISES THEIR ROLE AS A GATEKEEPER. THE
16 COURT HAS ALL THE DISCRETION, ALL THE AUTHORITY THAT IT NEEDS
17 TO LOOK AT WHAT DR. HARRISON DID, AND THE SAME WILL APPLY, OF
18 COURSE, TO DR. STEWART AS WELL, AND TO MAKE A DECISION ON
19 WHETHER OR NOT THAT MEETS THE STANDARD.

20 *THE COURT:* THANK YOU. WOULD YOU LIKE TO RESPOND
21 TO THAT CONCERNING THE REAL ANALYSIS ONLY BEING IN THE
22 AFFIDAVIT THAT THEY MOVE TO STRIKE.

23 *MR. JENSEN:* I DON'T THINK THAT'S RIGHT, YOUR
24 HONOR. I MEAN, WHAT IS RIGHT ABOUT IT -- THERE'S -- IT'S GOT
25 SOME TRUTH TO IT. THE LIST OF FACTORS THAT DR. HARRISON WENT

1 THROUGH IN HIS REPORT WITH RESPECT TO POSSIBLE ALTERNATIVE
2 CAUSES IS A SMALLER LIST THAN WHAT HE EVENTUALLY WENT THROUGH
3 IN THE AFFIDAVIT. IT'S A SMALLER LIST IN FACT THAN WHAT HE
4 WENT THROUGH IN HIS DEPOSITION.

5 BUT TO SAY THAT THAT MEANS THAT HE WASN'T -- HE HADN'T
6 RULED OUT THAT ANY OF THOSE THINGS WERE A SOLE CAUSE IS WRONG
7 FOR A COUPLE OF REASONS. NUMBER ONE, YOU KNOW, BY RULING IN
8 THE OCCUPATIONAL EXPOSURES TO BENZENE HIMSELF BASED ON
9 EVALUATING THOSE EXPOSURES AND COMPARING THEM AGAINST THE
10 LITERATURE, HE'S RULED OUT SOLE CAUSE FOR ANYTHING ELSE.

11 BUT HAVING SAID THAT, HE TAKES INTO ACCOUNT THESE OTHER
12 FACTORS IN -- TO SOME EXTENT IN HIS REPORT, TO A GREATER
13 EXTENT IN HIS DEPOSITION TESTIMONY, AND HE TAKES IT A STEP
14 FURTHER AND ADDRESSES A COUPLE OF THINGS THAT HE DOESN'T EVEN
15 THINK ARE REALLY RISK FACTORS FOR NON-HODGKIN'S LYMPHOMA THAT
16 HAVE BEEN RAISED BY DEFENDANTS' EXPERTS AND SAYS, WELL, I'M
17 GOING TO RULE THOSE OUT AS SOLE CAUSES, TOO, JUST OUT OF A --
18 SORT OF AN ABUNDANCE OF CAUTION, BUT -- AND THAT'S HOW IT --
19 HOW IT PLAYED OUT.

20 THE COURT: OKAY. THANK YOU. MR. MCGOLDRICK, DO
21 YOU HAVE ANYTHING TO ADD?

22 MR. MCGOLDRICK: YOUR HONOR, UNLESS YOU HAVE ANY
23 QUESTIONS FOR ME OR COUNSEL HAS ANYTHING ELSE TO ADD, I'M
24 JUST GOING TO LEAVE IT AS IS.

25 THE COURT: OKAY. ANYTHING FURTHER FROM ANYONE

1 ELSE? NO? VERY GOOD. WELL, IT'S A LITTLE AFTER FIVE. I
2 WILL STAND DOWN AND LET THE COURT STAFF GO. WE WILL -- WHAT
3 TIME DO Y'ALL WANT TO START TOMORROW MORNING? BIG NIGHT
4 TONIGHT, SO WHAT TIME YOU THINK YOU CAN ROLL IN TOMORROW?

5 MRS. BONNEVILLE: YOUR HONOR, WOULD IT BE POSSIBLE
6 TOMORROW TO START A LITTLE BIT EARLIER?

7 THE COURT: SURE. I'M HERE AT EIGHT OR 8:30.
8 COURT STAFF, WHEN DO Y'ALL...

9 (OFF-THE-RECORD DISCUSSION WAS HAD.)

10 MRS. BONNEVILLE: NINE IS FINE.

11 THE COURT: NINE GOING ONCE. GOING TWICE. YEAH.
12 OKAY. WE WILL START AT NINE TOMORROW AND THEN SEE -- AND SEE
13 IF WE CAN'T -- CAN'T FINISH UP THE ARGUMENTS. I DON'T --
14 Y'ALL ARE GOING AT A GOOD CLIP. I FEEL LIKE EVERYONE HAS
15 DONE A PHENOMENAL JOB IN ARTICULATING AND PRESENTING THE
16 POSITIONS.

17 I WILL, IF YOU ALL DON'T MIND, LIKE TO GET A PRINTOUT OF
18 YOUR NICE POWERPOINTS. I HAVE THE ONE FROM YOU, MR. JENSEN,
19 THIS MORNING. I DON'T HAVE YOUR AFTERNOON ONE. MR.
20 MCGOLDRICK, IF YOU DON'T MIND, THEN THAT WOULD BE REALLY
21 HELPFUL TO ME AND MY LAW CLERK.

22 MR. BOGLE: E-MAIL THOSE TO YOUR--

23 THE COURT: ABSOLUTELY. VAN WILL ACCEPT THOSE
24 WILLINGLY. AND I THINK THERE'S NOTHING ELSE THAT WE NEED TO
25 TAKE CARE OF ON THE RECORD, SO LET'S GO OFF THE RECORD.

1 (WHEREUPON, AN OFF-THE-RECORD DISCUSSION WAS HAD AS
2 COURT ENDED FOR THE DAY.)

3 ***

4 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT
5 FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

6
7 S/KATHLEEN RICHARDSON

8 ----- AUGUST 12, 2015

9 KATHLEEN RICHARDSON, RMR, CRR
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25